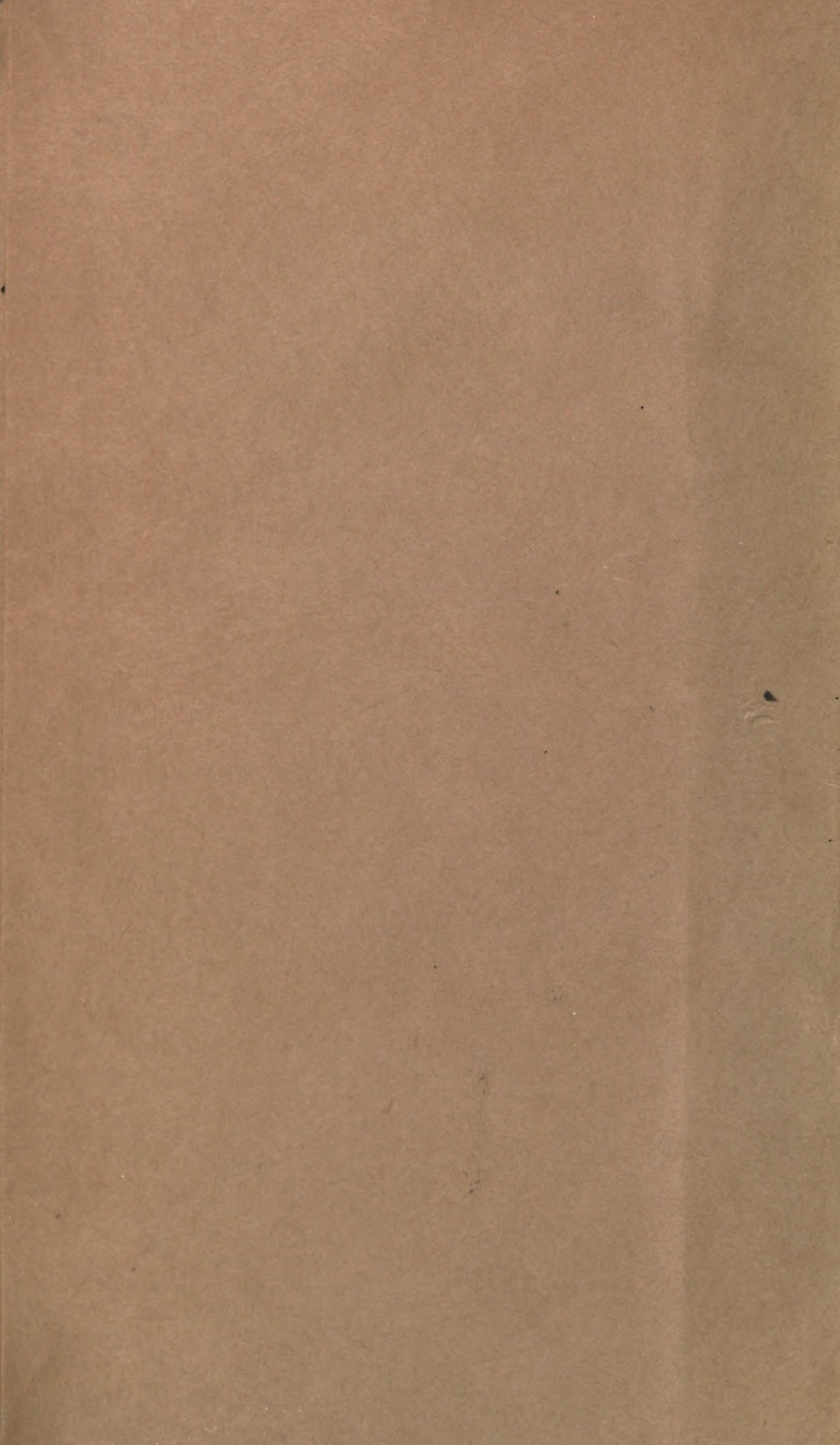





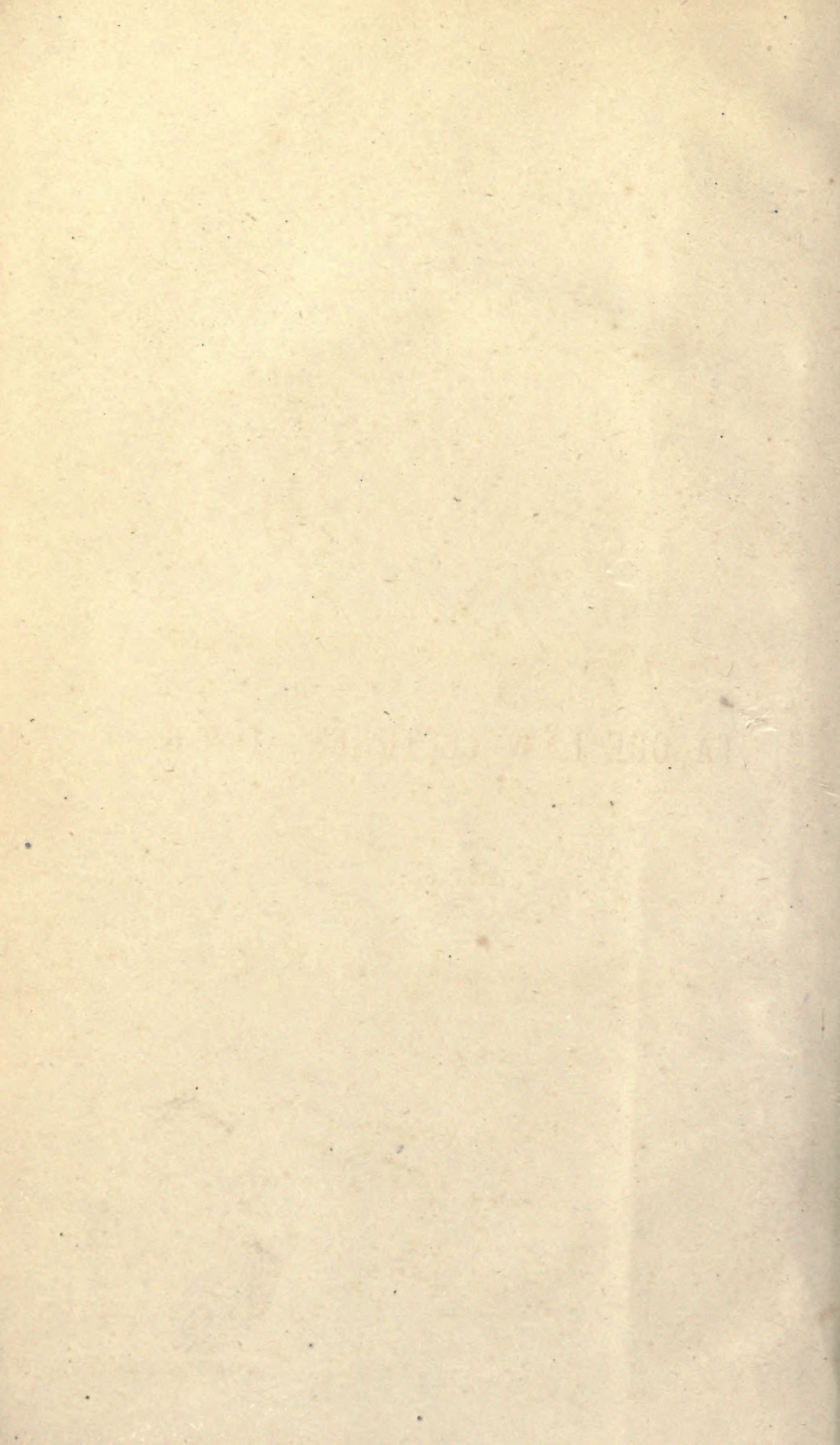
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THE

LAW OF MORTGAGE IN INDIA.

BY

RASHBEHARY GHOSE, M.A., D.L.,

SOME TIME TAGORE LAW PROFESSOR, CALCUTTA.

SECOND EDITION.

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PREFACE TO THE SECOND EDITION.

THE following lectures were originally delivered by me as Tagore Professor of Law in the year 1876, and were published in the succeeding year.

Nearly a dozen years have since passed away, and in the interval the Transfer of Property Act containing a special chapter on mortgages has been added to the Statute-book. The Courts of Justice too have not been idle and the law reports have furnished a mass of material, the value of which, if not always in proportion to its bulk, is still very considerable.

In bringing out the present edition I have endeavoured to introduce the various alterations which have been made in the law since the date of the first publication of these lectures. The Transfer of Property Act with notes has been added as a supplement, while the new cases as a rule have been worked into the text.

I have also taken this opportunity to introduce a larger number of decided cases than was compatible with the original design of the work as a course of lectures intended for the instruction of law students. This new feature will, I trust, render the book more acceptable to the profession without detracting from its usefulness to the class for whose benefit it was originally composed.

Owing to the numerous changes which have taken place during the last twelve years, I have been obliged to re-write some portions of the work, while large additions have been made nearly to every part. The original design and mode of arrangement of the former edition have been however retained, although both are no

doubt susceptible of a great deal of improvement. I can only plead in extenuation the daily interruptions of professional life which seldom leave the practising lawyer much leisure for the labours of an author. A few hours, it should be remembered, occasionally stolen from business is all that he can hope to bestow on his work.

The alterations made by recent Statute-law, not being of a retrospective character and the Statute itself having at present a somewhat limited territorial operation, I have thought it proper to retain the exposition of the old law which was contained in the former edition, and which has not yet become wholly obsolete.

In conclusion, I have to thank Mr. S. P. Sinha, advocate, for the preparation of the index to the present edition. My thanks are also due to Babu Ashutosh Mookerji, M.A., F.R.A.S., F.R.S.E., for passing the sheets through the press.

CALCUTTA, }
1st May 1889. }

RASHBEHARY GHOSE.

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LAW OF MORTGAGE.

ERRATA.

- Page 113, line 4, from bottom, *dele* 'Suth.'
„ 145, line 19, *for* 'Cal.,' *read* 'Bom.'
„ 163, line 11, from bottom, *for* 'L. R., P. C.,' *read* 'App. Cas.'
„ 188, last line, *for* 'IV,' *read* 'V.'
„ 192, line 3, *for* 'VII,' *read* 'XVIII.'
„ 203, line 2, from bottom, *for* '119,' *read* '199.'
„ 247, line 23, *for* 'were,' *read* 'mere.'
„ 270, line 13, *for* 'N.-W. P.,' *read* 'VII All.'
„ 278, note, line 15, from bottom, *for* 'All.,' *read* 'Mad.'
„ 313, last line, *for* 'Bhairab Mondal,' *read* 'Boistub v. Huro
Narain.'

Remedies of mortgagee may be pursued concurrently — Insufficient security — English remedy foreclosure, but sale the more equitable remedy — Who may redeem — Equity of redemption cannot be restrained even by express contract — Equity of redemption in the case of a second mortgage without notice — Power of sale — Liabilities of the mortgagee — Influence of civil law — Note giving tabular view of the classification of securities in Roman law.

THE history of archaic institutions shows how very slowly the most familiar juridical conceptions of the present day have been matured. Few persons, I venture to affirm, would think of questioning the truth of this assertion at the present moment; and yet, even a slight acquaintance with legal literature will show, that it is only recently that wild speculation and rash assertion have given place to sober reasoning and careful observation. Comparative jurisprudence, in a few short years, has accomplished many striking results; but, not the least important of these, is

Early history of institutions.



LAW OF MORTGAGE.

LECTURE I.

Early history of institutions — Doctrine of evolution in law, illustrated by the Hindu Will — Early notions of security — Early law of distress — Mortgage in early law — Possessory lien — Powers of sale and foreclosure — Real security, how distinguished from real right — Historical sketch of the Roman law of securities — Similar notions traceable in early Hindu and Mahomedan law — *Fiducia* — *Pignus* — Improvements in the Roman law of pledge, by the *Prætorian* jurisdiction, the *actio serviana*, and the quasi-servian action — External influences which modified the Roman law — Growth of real security — Power of sale — History of the *Fiducia* — The *lex commissoria* — Foreclosure in Roman law — Three-fold division of securities by Roman jurists, into conventional, legal, and judicial — Rights of pledgor and pledgee in Roman law — Sale by mortgage — Right of redemption — Tacking — Priority determined by time — Potestative and non-potestative conditions — Exceptions to the rule of priority — Salvage liens — Privileged liens — Tacit hypothecation in Roman law — Hypothecation how extinguished — Extinction by merger — Marshalling in Roman law — Effect of the mortgagor subsequently becoming the owner — Right of subrogation, how acquired — Extinction of pledge — Pledge when redeemable — *Antichresis* — Liabilities of the pledgor and of the pledgee — Pledge in systems founded on Roman law — Important deviation in continental law — English law of mortgage — Equity of redemption — Bill of foreclosure — Decree for sale — Remedies of mortgagee may be pursued concurrently — Insufficient security — English remedy foreclosure, but sale the more equitable remedy — Who may redeem — Equity of redemption cannot be restrained even by express contract — Equity of redemption in the case of a second mortgage without notice — Power of sale — Liabilities of the mortgagee — Influence of civil law — Note giving tabular view of the classification of securities in Roman law.

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Early history of institutions.

LECTURE the dissipation of the numerous fallacies which once clustered round the early history of law. Experience,

I.

Doctrines of
evolution
in law.

The Hindu
Will.

however, tells us that speculative errors possess remarkable vitality; and it would be rash to suppose that delusions once so common, have wholly died out in our time. The tendency to confound the earlier stages of law with its maturity is by no means uncommon even at the present moment; and the warning cannot be given too soon, nor repeated too often, that it is only by a careful study of the gradual development of legal conceptions, that we can guard ourselves against mistakes into which we should otherwise be almost sure to be betrayed. In common with the class to which they belong, the delusions of which I speak, point to modes of thought from which we cannot emancipate ourselves without a conscious effort of the mind. We find it difficult to realize the intellectual condition of society in its infancy, and are frequently betrayed into transferring to ancient law, conceptions which find a place in some of the latest improvements in jurisprudence. The history of the Hindu Will furnishes us with a case in point. I do not mean to deny that testamentary succession was known to the Hindu law; but there can, I think, be no reasonable doubt that we owe the first recognition of the institution by English lawyers to the supposed analogy between a gift and a bequest. The analogy may be very close or it may be merely fanciful. This is not the place to discuss the question, but I may be permitted to observe that an examination of archaic institutions shows, beyond the shadow of a doubt, that testamentary succession belongs to a range of ideas, very much in advance of that which permits the owner to make a gift of his property during his life; and that in no system whatever, has the law of wills grown out of, although it may have sometimes shaped itself on the model of, the law regulating gifts during life.

I trust I have said enough to make it unnecessary for me to insist on the interest which attaches to the early history of those legal conceptions which we now see only in their maturity. We may not in every case be able to trace the outlines distinctly; but the assertion may be hazarded without rashness, that there is not a single juridical conception which may not be historically examined with advantage. A few words therefore on the origin and growth of the law of securities, the immediate subject of the present lectures, will not, I trust, be thrown away.

A learned writer on the law of mortgage has said that pledges must have come into use as soon as the rights of property were recognized. This assertion, however, must be received with considerable reserve. It is true that pledges were known to early law, but the conception when it first shows itself, is marked by the crudity peculiar to the infancy of law; and, the nearest approach to it, is to be found in the early law of distress, which fills such a large space in all ancient systems of law.

LECTURE
I.Early notions of
security.

The writings of Sir Henry Maine have made us familiar with the important part played by the law of distress in primitive society, an extra-judicial remedy which gradually replaced the barbarous custom of reprisals. A probable legacy from early Aryan usages, it seems at one time to have been the almost universal method of enforcing satisfaction for all claims, and was not confined, as in some modern systems, principally to the demands of the landlord on his tenant. But, as Sir Henry Maine points out, this extra-judicial remedy, when it is first revealed to us, is both inadequate and incomplete. The distrainer could only extort satisfaction by retaining the property in his custody, and thus forcing his adversary, so to speak, to come to terms. He could not sell the property and thus satisfy his claim, nor was the distress forfeited to him in satisfaction of his demand. The distrainer acquires this right, but only very gradually in the maturity of jurisprudence, and we find that, even in so progressive a country as England, the power of sale was engrafted on the old common law, only towards the end of the seventeenth century. (Maine's *Early History of Institutions*, Lecture X; *Smith's Landlord and Tenant*, p. 263.)

Early law
of distress.

I have called your attention to the law of distraint, as described in the pages of Sir Henry Maine, because you will find a remarkable similarity between it and the law of pledge, as well in their earlier features as in their later developments, the evolution, if I may say so, having proceeded on almost parallel lines.

Let me pause here for a moment to explain that, according to modern notions, the very essence of a security is the right of the creditor to obtain satisfaction, wholly irrespective of the ability or willingness of the debtor. If the debtor makes default, the creditor may either sell the property and repay himself out of the purchase-money, or the pledge is forfeited to him in satisfaction of his demand.

LECTURE
I.

Mortgage
in early
law.

The debtor may be obstinate or unable to pay, but the creditor can always obtain satisfaction out of the property pledged to him, and is, therefore, wholly independent of the debtor. It is, however, only in the maturity of jurisprudence that the pledgee acquires this right;—a right which is justly regarded as the very perfection of a security. In the infancy of law, a pledge was only regarded as a means of compelling satisfaction. The creditor, by detaining the pledge, might compel the debtor to fulfil his engagement; but, beyond the pressure which the pledgee was thus in a position to put on the pledgor, the creditor could not turn his security to account. In other words, a pledge only operated on the will of the debtor. The creditor had no authority to sell the pledge, nor was it forfeited to him in discharge of his demand.

Possessory
lien.

Modern law furnishes us with an instance of a right closely resembling the right of the pledgee in ancient law. English lawyers have frequently pointed out the unsatisfactory character of what is called a “possessory lien” in English law, a bare right of detention, unaccompanied by any power of sale or foreclosure. It is no doubt an anomalous right; and the true explanation of the anomaly lies in the fact that it is a mere survival. We have here an instance, by no means exceptional, in which a conception, distinctly archaic, is found to linger in a system which has shown no mean capacity for expansion with the multiplying wants of an active commercial age.

Powers of
sale and
foreclosure.

I have said that in ancient law a pledge was regarded simply as a means of extorting satisfaction, and that the powers of sale and foreclosure with which we are so familiar at the present day, are improvements which are only found in mature jurisprudence. I shall now ask you to test the soundness of the conclusion by an examination of a system of law, which, while it has powerfully affected in its maturity the institutions of the greater part of the civilized world, is, perhaps, also the only system which possesses a continuous history of this branch of jurisprudence. I allude to Roman law, a system which must always possess peculiar attractions for the student of comparative jurisprudence; for there you may see legal conceptions in the rough as well as in their highest finish, the whole process of evolution unfolding itself as it were before our very eyes, by slow and almost imperceptible gradation. “In the history of legal conceptions,” as observed

by Dr. Hunter, "the Roman law occupies a position of unique value. It forms a connecting link between the institutions of our Aryan forefathers and the complex organization of modern society. Its ancient records carry us back to the dawn of civil jurisdiction, and, as we trace its course for more than a thousand years, there is exhibited a panorama of legal development such as cannot be matched in the history of the laws of any other people." (Hunter's Introduction to Roman Law, page 1.)

LECTURE
I.

The evidence furnished by Hindu and Mahommedan law is less authentic, and has to be approached with greater caution. I hope, however, to be able to show in the next lecture, that there are passages, as well in our own law as in the Mahommedan law, which fortify, in a remarkable manner, the conclusions suggested by an historical examination of the Roman system;—passages which can only be explained on the hypothesis that a real security, a security which makes the creditor wholly independent of the debtor, finds its place in every system among the latest improvements in jurisprudence. For the present, I shall confine myself to the Roman law.

I have not paused to explain with sufficient clearness the meaning of the words "real security," an expression which I have already used more than once. A real security is a security in which the creditor possesses the right to satisfy his demand out of the property pledged to him, and must be carefully distinguished from a real right, which, as I shall have occasion to explain more fully hereafter, is simply a right availing against the world at large, and not merely against a determinate person or persons. A creditor may have a real right in property belonging to his debtor, and yet he may not possess a real security. Thus, if any body should take out of my possession property on which I have a bare lien, I have a right to have the property brought back into my possession, but I have no right, the security not being real, to sell the property in satisfaction of my demand. The distinction is a very important one, and must be carefully borne in mind in the discussions in which we shall presently be engaged.

Real security, how distinguished from real right.

Let us now turn to the Roman law for the purpose of ascertaining the successive steps by which the law of securities was gradually developed. The subject has already been investigated by a living German jurist, and the results

Roman law of securities.

LECTURE of his labours have been made accessible to English readers
I. by Dr. Markby in his *Elements of Law*. (See Chapter XI.)

Fiducia. The earliest form of security known to the Romans appears to have been the *Fiducia*. This was a proceeding by which the debtor transferred to the creditor the ownership of the property which was intended to be given as a security; the creditor on his part agreeing to restore it to the debtor as soon as the obligation was fulfilled. If the debtor, however, made default, his right to the property was not extinguished. To use the language of modern law, the debtor possessed an equity of redemption, of which the creditor could not deprive him, either by sale or foreclosure (*a*). I shall pass over, for the present, the successive steps by which the *Fiducia* ultimately ripened into a real security, and proceed to discuss another mode of giving security; which, although a later invention, was ultimately destined to replace the *Fiducia* in the jurisprudence of Rome.

Pignus. This was the *Pignus* which, in its earliest form, was a proceeding by which the debtor transferred, not the ownership, as in the *Fiducia*, but the bare possession, to his creditor. The pledgee only possessed the right of detention. Even this right, however, was at first extremely precarious. It was not protected by a real action, as the law refused to recognise a real right in the creditor. So long as this was the case, land was rarely given in pledge, as the creditor had no remedy if the debtor made a fraudulent alienation. This was, no doubt, a very unsatisfactory state of things. The law, however, was insensibly developed by the *Prætorian* jurisdiction, to which Roman jurisprudence is indebted for so many reforms. Under the semblance of moulding the procedure of the Courts over which they were called upon to preside, the Roman *Prætors*, by promising to grant a particular action or plea, remodelled almost every branch of the law, and owing to circumstances to which I shall presently refer, the law of security seems to have claimed their attention at an early period. The first improvement was effected by a *Prætor* named *Salvius*, who allowed the validity of a pledge, although not followed by a transfer of possession, in the

Prætorian
law.

Improvements in the
Roman law
of pledge.

(*a*) I am bound to state that a somewhat different view has been taken by Dr. Hunter in his *Roman Law*, but as the *Fiducia* never occupied an important place in Roman law, and as it shortly fell into disuse, it is not necessary to discuss its precise incidents.

case of a tenant pledging his farming stock as security for the rent payable by him. This improvement was followed by the 'actio serviana,' which allowed the landlord to enforce his claim by a real action, unfettered by the somewhat inconvenient limitations by which the Prætor Salvius had sought to fence in the right of the landlord to follow the pledge in the hands of third persons. Originally confined to the security of the landlord on the farming stock of the tenant, the right was extended in course of time to all classes of pledges, whatever might be the nature of the property, and whether the pledge was or was not accompanied by possession. The last improvement was accomplished by the 'quasi-servian action,' which marks an important epoch in the history of the Roman law of securities. The jealousy with which archaic law guards the creation of all real rights, has now been relaxed. A mortgage may thus be created without delivery of possession, and the "substantial pledge has been refined into the invisible rights of a hypotheca."

LECTURE
I.Actio
serviana.Quasi-ser-
vian action.

I have said that there were influences at work from without, which, while they hastened the development of this branch of the Roman law, also determined, in a great measure, the direction of that development.

"The most important improvements in the Roman law of security," says Dr. Markby, "were not introduced until, by the extension of the Roman dominion beyond the confines of Italy, very large estates first became common. From this time large numbers of slaves, and even of free persons, began to be employed in cultivating these properties. Small estates also were sometimes let out to farm. Hence the necessity that the landlord should have some security for his rent became apparent at Rome, as it has in all places where the land of one person is cultivated by another."

External
influences
which
modified
the Roman
law.

"Under the old law it was not easy for the landlord to obtain this security from the cultivator. Generally the only property which the cultivator had, was his farming stock (*invecta et illata*); and it was obvious that this could neither be assigned to the landlord by a *fiducia*, nor given into his custody by a *pignus*. It was, therefore, necessary to devise some other means of effecting security; and the mode adopted was, to allow the tenant by a simple agreement, without any formalities, to pledge his farming stock to his landlord as a security for the rent." (*Elements of Law*, §§ 443, 444.)

LECTURE
I.Growth of
a real security.Power of
sale.History of
the Fiducia.The *lex
commissoria*.

I shall now proceed to state the successive steps by which the creditor gained a real *security*, which, as I have already explained, is very different from a real *right*. This was originally accomplished by the introduction of a clause expressly authorizing a sale upon default, a clause which appears to have been suggested by a right possessed by the State of selling land pledged to it. At a somewhat later period, this right was presumed to exist in every pledge in the absence of anything to indicate a contrary intention. The creditor thus acquired the right to realize his money by the sale of the pledge; in other words, the creditor acquired a real security. The power of sale now came to be regarded as a right inherent in the pledgee, or, as a Roman lawyer would, perhaps, have said, one of the natural incidents of a pledge; and, it was probably under the influence of this dominant idea, that the law, at a later period, permitted a sale, even when the creditor had expressly agreed not to exercise the power.

We have now reached the stage in which the law stood in the maturity of Roman jurisprudence. The bare right of detention originally possessed by the creditor, has now been succeeded by a right of sale, which, as we have seen, could not be controlled even by the express agreement of the parties; while the somewhat cumbrous formalities which were originally necessary to the validity of the *Pignus* (including the transfer of possession) have been replaced by a simple agreement of the parties.

In giving an account of the Roman law of security, I did not notice, at the proper place, the improvements which took place in the *Fiducia*. The gradual progress of the *Fiducia*, from a bare right to compel the debtor to make satisfaction, to its latest improvements, when it ripened into something like the mortgage of the English law, or our own conditional sale, is not less interesting than the development of the kind of securities which I have been hitherto considering.

The first improvement was the introduction of a clause, the *lex commissoria*, by which it was agreed that the creditor should become, on default, the absolute owner of the property pledged to him. Such a covenant, however, if literally enforced, was likely to operate in many cases with considerable hardship upon the debtor; and the stringency of the condition was relaxed by subsequent legislation. The default of the debtor was not immediately followed

by forfeiture, and he was permitted to redeem, if he fulfilled his obligation, within a reasonable time. The position of the creditor now became analogous to that of an English mortgagee, and the conflicting rights of the pledgor and pledgee were, in some measure, reconciled with justice and equity. Roman lawyers, however, could not bring themselves to accept as final such an imperfect reconciliation. It offended their sense of "elegance." A pledge, whatever might be the language used by the parties, was only a security for the debt, and the creditor was not in fairness entitled to anything more. In later Roman law, therefore, the creditor was not suffered to foreclose, but could realize his dues only by the sale of the property pledged to him. You will presently see that the English law is also slowly drifting towards the same point. The power of directing a sale instead of a foreclosure, which used to be exercised so very sparingly by the English Courts of Equity, has been extended by a recent statute, while other indications are also not wanting, that the total abolition of foreclosure is only a question of time.

Foreclosure in Roman law.

From what I have said, I think it is clear that a real security is the most perfect security. The history of the Roman law shows that it was only very slowly that the right of detainer, the only security recognised in early times, ripened into a real security. An examination of Hindu and Mahommedan law also suggests the conclusion that a security in the infancy of law only operated upon the will of the debtor. I shall, however, as I have already stated, discuss this point in the next lecture, when I propose to give a general outline of the law of security as it is to be found in Hindu and Mahommedan legal treatises.

I shall conclude this part of my lecture with a few general observations on the Roman law of security, and I propose, in the first place, to call your attention to the threefold division of securities by Roman lawyers—a division which, although not, perhaps, strictly logical, is eminently convenient for our purpose (b).

Threefold division of securities by Roman lawyers.

Roman law divides securities or mortgages into three classes,—conventional or consensual, legal, and judicial. A conventional mortgage is one created by the agreement, express or implied, of the parties, and calls for no remark. A legal mortgage is, as the name imports, one which is

Conventional mortgage.

(b) See note A at the end of this lecture.

LECTURE

I.

Legal
mortgage.Judicial
lien.

created merely by the operation of law. A legal mortgage, however, must not be confounded with implied conventional mortgages, which are really based upon the voluntary consent of the parties, the distinction between the two being precisely the same as that between implied contracts and quasi-contracts. The judicial lien of the civil law, is a lien created by an order of a Court of Justice, for the purpose of compelling obedience to its orders, and corresponds to the process of attachment under the procedure of our Indian Courts. I do not propose to discuss at length the various rules which governed each of these classes of securities, as this is not the place for such discussion. Much of our own law of mortgage is, however, still in an uncertain, if not in a fluid, condition, and I shall, therefore, be obliged to refer occasionally to the Roman law which, although not possessed of any inherent binding authority, has always proved an almost inexhaustible store-house of legal principles, and may be usefully consulted in all doubtful cases arising in our Courts. A few general observations, therefore, will, I trust, assist you in following me through some of the discussions in which I shall be engaged in the course of these lectures.

Rights of
pledgor and
pledgee in
Roman law.

The pledgee possessed in later Roman law, as we have already seen, a right to sell the pledge,—a right which might be exercised by him, even if he had engaged with the debtor not to sell the pledge in satisfaction of his demand. But the creditor was not at liberty to sell, until his claim was fully due and payable; and even then he was bound to give the debtor notice of his intention to sell. If, however, the creditor had expressly engaged not to exercise the right of sale, he was bound to issue three successive notices, instead of the one which was ordinarily required by the law. The pledgee was not bound to invoke the process of the Court for the sale of the pledge; but the sale, in the absence of any express agreement to the contrary, must have been effected publicly, and the debtor summoned to be present. In later Roman law, the exercise of the power of sale was hemmed in by further provisions for the protection of the debtor. If the parties agreed as to the manner, time, and other conditions of the sale, the creditor was bound to act in accordance with the terms of the agreement; but, where the contract was silent on the point, the mortgagee, if in possession, was bound to give formal notice of his intention to exercise his power of

sale to the debtor ; if he happened to be out of possession, he was bound to obtain a judicial decree, and, after the lapse of two years from either of these events, the mortgagee was entitled to sell the property. (Hunter's Roman Law, p. 437.) But the creditor was not entitled to anything in excess of the amount of his debt with interest, if any, and costs. If there was any overplus, the debtor was entitled to it ; who, on the other hand, was not released from liability if the proceeds fell short of the demand of the creditor. The creditor, however, could not be compelled to sell, unless the debtor gave security for the payment of the debt in full ; but a fraudulent sale rendered the creditor personally liable to the debtor, and if recourse against the creditor was impossible, the purchaser might be compelled to make restitution. If no bidder offered a reasonable price, the creditor might himself obtain an assignment of the pledge for a fair price ; such an assignment, however, did not absolutely extinguish the debtor's right of redemption.

The debtor, before the exercise of the right of sale by the creditor, was not restrained from dealing with the property in any way he thought proper, provided that the security of the creditor was not thereby impaired. The pledgee could not be affected by any disposition which the pledgor might make of the property pledged by him. The right of the pledgee was a real right, and could not be prejudiced by any alienation made by the debtor. A sale by the creditor, therefore, passed the property to the purchaser, free of all incumbrances subsequently created by the debtor.

It would appear, although the point is not quite free from doubt, that the right of sale could be exercised only by the first pledgee, and not by the second or any subsequent incumbrancer. It was, however, always open to the puisne pledgee to redeem the prior mortgagee, and thus acquire the rights of the latter. This right of redemption was not confined to the second mortgagee, and any mortgage creditor might place himself in the situation of the first mortgagee by the payment or deposit of the amount of his demand, but the privilege could not be claimed by an unsecured creditor. The principle of the English law, however, by which a preference may, in certain cases, be gained over an intermediate incumbrance, was not recognized by Roman lawyers, although the mortgagor himself was not permitted to redeem without paying to the

LECTURE
I.Sale by
mortgagee.Right of
redemption.Tacking in
Roman law.

LECTURE mortgagee all the debts, whether secured or unsecured, which might be due to him from the mortgagor, but the right could not be asserted against a subsequent incumbrancer.

I.

Priority determined by time.

Potestative and non-potestative conditions.

The priority of mortgages was, as a rule, determined by the order of time, and it seems that delivery of possession conferred no advantage. (But see Colquhoun's Civil Law, § 1475.) It is, however, necessary to remember that, the time by which priority was regulated, was not the date on which the money for which the security was given was actually borrowed, but that on which the contract of mortgage was entered into. If, therefore, the mortgage was created subject to any condition, it would, on the fulfilment of that condition, relate back to the date when the mortgage was granted, but there was a distinction between what Roman lawyers called a casual and a potestative condition. Thus, suppose A hired a bath from B from the next kalends, and agreed that his slave C should be security for the rent, but before the kalends A borrowed money from D, and hypothecated C to him. In this case, B would have priority over D, although there was nothing actually due for rent at the time D made his advance, the reason assigned for the preference being, that the hypothec was attached to the contract of hire in such a manner, that without the consent of B it could not be got rid of. B would, therefore, have the first hypothec. (Hunter's Roman Law, p. 441.) But the case which I have just put, must be distinguished from the class of cases in which the agreement, although prior in date, was, to borrow the language of Roman law, only potestative, that is, did not create binding obligation either to lend or to borrow. Thus, suppose A agrees with B to lend him money by a certain day, the farm of B to stand as security, but before any money has been advanced by A, suppose B borrows from C and hypothecates the same farm; if A should, afterwards, advance money under the agreement to B, he would not, it seems, be entitled to priority over C. (Hunter's Roman Law, p. 441. See also the authorities collected in Burge's Foreign and Colonial Law, Vol. III, p. 180.) The distinction between the two cases is, as I have already suggested, that in the one an obligation is created *in presenti*, although it is to come into force at a future date, while, in the other case, there is no obligation imposed on the one party or on the other, either to lend or to borrow the promised money.

There were, however, exceptions to the rule of priority founded either on grounds of public policy or on equitable considerations, and these exceptions were known in Roman law as privileged liens. They are thus classified by Dr. Hunter in his treatise on Roman law :

LECTURE
I.
—
Exceptions
to the rule
of priority.

(1) The Imperial Exchequer (*Fiscus*) which came before all creditors for arrears of fines.

(2) A creditor advancing money to buy office (*militia*) expressly on the condition of obtaining priority.

(3) A married woman suing for the recovery of her *dos*, but not in respect of the *donatio ante nuptias*.

(4) A person advancing money on the security of any house or property for the purpose of preserving it from destruction. (Hunter's Roman Law, p. 442.)

Other privileged hypothecs ranked according to their priority in time, but an exception was recognized for obvious reasons in favour of salvage liens in which priority was regulated in the inverse order, the later being preferred to the earlier.

Salvage
liens.

It is important to observe the change introduced into the later Roman law by which a hypothec made by a public deed, that is, sealed in the presence of witnesses and prepared by a notary (*tabellio*), had priority over hypothecs attested only by private documents. Leo gave the same privilege to a private writing signed by three good and respectable witnesses, and Justinian continued and confirmed the privilege. (Hunter's Roman Law, p. 442.)

I may mention that the pledgee was entitled in the Roman law to a lien for any advances made by him for the purpose of preserving the pledge. All such advances were regarded as privileged debts, and in cases of disputed priority, took effect accordingly, and not simply from the date when the expenses were actually incurred. A privileged lien was also recognized in favour of a person whose money had been laid out in the improvement of an estate, but there was a difference between the position of such a person and that of a creditor by whom the property itself had been preserved. In the latter case the lien attached to the thing itself, while in the former case the preference was limited to the improvements, and did not extend to the estate itself. (Domat's Civil Law, § 1742.)

Privileged
liens.

The Roman law abounds in instances of tacit or legal hypothecation, and it may be said without exaggeration that the pages of the Digest as well as the writings of

Tacit
hypotheca-
tion in Ro-
man law.

LECTURE
I.

civilians bristle with liens created merely by operation of law. The hypothec of pupils over property bought by their tutors with their money, the hypothec of a person making a loan for the purchase of a house, are only some of the numerous instances which might be cited in illustration of the readiness with which Roman lawyers allowed a lien to be annexed to a great variety of transactions. It is, however, unnecessary to notice them in detail in this place, as they owed their existence mainly to artificial causes, and, however well adapted to the requirements of the community in which they grew up, cannot be held up as patterns for close imitation in the jurisprudence of communities cast in a different mould, and governed by institutions of a different type. In every body of law, care must be taken to distinguish those portions of it which rest upon natural equity, reflected in the dry light of reason, from those which have grown out of mere accidental conditions, and which always take their colour and shape from their environments. It is, surely, possible to admire a system without acknowledging that every part of it is adapted to the requirements of all ages and countries. Our admiration, however well-founded, should not be allowed to betray us into confounding the general with the special, the essential with the accidental. This caution is, perhaps, nowhere more necessary than in India, where its neglect has led to the introduction of much law of very doubtful equity but of most undoubted subtlety, the only apology for which, I am afraid, is to be found in the 'fluidity' of our law, and I may perhaps add without disrespect, the facility with which the work of consolidation can be effected.

Hypothecation how extinguished.

A hypothecation came to an end by payment or tender followed by consignation or deposit of the mortgage debt, together with interest and such expenses as the mortgagor was bound to pay. It was also destroyed by a release by the creditor which might be either express, or implied from his conduct, as, for instance, by his agreeing to take a different security. But a novation, by which term the transaction was known to the Roman law, did not extinguish the original mortgage if it was renewed at the time of the substitution, but such mortgage took effect only according to the extent of the original lien and did not attach to any further sum in which the debtor might subsequently become indebted to the mortgagee. (Burge's Foreign and Colonial Law, Vol. III, p. 215, and p. 237.

See also Colquhoun's Roman Law, § 1475.) I may also mention that a creditor who had got a tacit mortgage, did not release or discharge it by taking a conventional security, nor did he surrender his priority in any way by accepting such a mortgage. (Burge's Foreign and Colonial Law, Vol. III, p. 242.)

LECTURE
I.

The pledge might also be extinguished by merger which occurred when the rights of the pledgor and of the pledgee became vested in the same person, but no merger took place where the operation of the rule would work any injustice. If it was indifferent to the person, in whom the union of interest arose, whether the charge was kept alive or extinguished, a merger might be presumed in the absence of anything to repel such inference, but there was no merger where any beneficial purpose could be answered by keeping the mortgage alive. I need scarcely point out, that the right of the pledgee was liable to be extinguished by the law of prescription, and that, of course, the security could not be enforced if the pledge was destroyed, although where the destruction was accidental, the right of the creditor to recover payment was not in any way affected by the loss. But nothing falling short of destruction could put an end to the pledge, and if the subject of the pledge only suffered a change, the pledgee could enforce his rights against it notwithstanding such alteration.

Extinction
by merger.

It is instructive to observe that the doctrine known as marshalling in the English Court of Chancery, was recognized, to a certain extent, in the later Roman law, and a third person in possession of the mortgaged property might, under certain conditions, insist upon the creditor proceeding in the first instance against the debtor and his sureties, but no such indulgence could be claimed by the person in possession, if he knew, at the time he acquired the mortgaged premises, that they were subject to the mortgage, or if he acquired them after a suit had been instituted against the mortgagor on the mortgage security. (Burge's Foreign and Colonial Law, Vol. III, p. 221.)

Marshall-
ing in Ro-
man law.

It appears that if a person who was not the owner of a property mortgaged it, and afterwards happened to become the owner, the property so acquired would be subject to the mortgage created by him, and it seems, although the point is not free from doubt, that the mortgage related back to the date of the original contract and would be preferred to a subsequent mortgage granted after the acquisition of the

Effect of the
mortgagor
becoming
the owner.

LECTURE I. *dominium* by the mortgagor. (See the authorities for and against this proposition, collected in Burge's Foreign and Colonial Law, Vol. III, pp. 173-174.)

Right of subrogation in Roman law.

The right of substitution or subrogation formed an important branch of the Roman law of mortgage, and was recognized in it to an extent to which it has not been carried in most modern systems. A subrogation in the Roman law might be either conventional, that is, consensual, or it might take place by mere operation of law. A subsequent mortgagee, who paid off a prior mortgagee, was entitled as of right to stand in the place of the latter, and this is an instance of subrogation by operation of law, while an instance of conventional subrogation is furnished by the ordinary case of an assignment of his security by the mortgagee. A creditor who lent money to the debtor for the purpose of paying off a mortgage, on the condition that he was to be substituted in the place of the mortgagee, was also entitled, under certain circumstances, to the benefit of the mortgage. (Domat's Civil Law, § 1774.) The right of substitution might also, in some cases, be acquired by an order of Court, made with the consent of the debtor, or, even sometimes without such consent. A similar right was allowed in favour of a person to whom a mortgage debt was sold under a decree of a Court of Justice. The right of subrogation was not, however, necessarily dependent, either on the order of a Court of Justice, or, as you have just heard, on the consent of the parties. A subsequent pledgee, for instance, by paying off a prior mortgagee, could, as I told you, claim to stand in the place of the latter, and so also could a purchaser who had paid off a mortgage on the property purchased by him. (Domat's Civil Law, § 1777.) Again, if the purchase-money was applied by the vendee in payment of a prior mortgage, he could always insist upon standing in the place of the mortgagee, and might use the mortgage as a shield against the claims of all intermediate incumbrancers. (Domat's Civil Law, § 1785.) A surety also, who discharged the debt of his principal, was entitled to the benefit of any securities which might be held by the creditor against the principal debtor.

Extinction of pledge.

It appears that the pledge ceased to exist, if the debtor happened to lose his right to the pledge, as if, for example, he was evicted by a title paramount, but the rule was carefully guarded so as to protect the mortgagee from the fraud or laches of his mortgagor. Thus, if the mortgagor having

How acquired.

a good defence neglected to defend an action against him, or if he abandoned his right, the rights of the mortgagee were not affected in any way. (Domat's Civil Law, § 1798.) It is superfluous to state, that if the termination of his estate or interest depended on the mortgagee himself, as if he had purchased a property, with an option to rescind the sale, he could not exercise this liberty after having mortgaged it to a third person. (Burge's Foreign and Colonial Law, Vol. III, p. 241.)

LECTURE
I.

Everything which might be sold, could be lawfully mortgaged in the Roman law. But property which could not be the subject of alienation, could not be the subject of mortgage. A mortgage might be either general, that is, it might include the whole of the property which the debtor possessed at the time of the mortgage, or which he might subsequently acquire; or it might be special, that is, confined to some specific property. The debtor might pawn corporeal or incorporeal things, but not the necessary wearing apparel of himself or of his family, or the implements of trade or agriculture. Then again things which were extra-commercium could not, of course, be the subject of mortgage. A security, moreover, might be given, not only for the repayment of a debt, but also for other considerations. It might, for instance, be granted by the vendor of a property to the purchaser to indemnify him in case he should be evicted. The creditor might be put in possession of the property pledged to him, in order that he might satisfy himself out of the rents and profits. Such an agreement, however, was not permitted to be made the means of obtaining usurious interest. If the mortgagee was in possession, his receipts were set off against the debt, but there was a well-known form of mortgage known by the name of Antichresis in which the mortgagee could retain the profits in lieu of interest.

Subjects of
mortgage.Antichre-
sis.

The pledgee was liable in the Roman law to take the same care of the pledge as a prudent father of a family would of his own property, but if the pledge perished accidentally in his hands, the mortgagee incurred no liability, and he might, in such case, either demand another security, or recover the debt immediately from the pledgor. The debtor, again, on his part, was bound to pay the creditor any expenses necessarily incurred by him for the preservation of the mortgaged property, as, for instance, for repairing a house, but there seems to have been some doubt as to the right of

Liabilities
of the
pledgee.Liabilities
of the
debtor.

LECTURE
I.Pledge
when
redeem-
able.

the pledgee to reimbursement for expenses which, although not necessary, were beneficial to the mortgaged property—a doubt which, as we shall see in a subsequent lecture, lingers even at the present moment in the English law, and which certain recent decisions have by no means served to dispel.

Before dismissing the subject of Roman law, I will mention one or two other points which also deserve the attention of the student. A purchase of the mortgaged property by a subsequent mortgagee, although made under a sale by the first mortgagee, did not pass to the purchaser an irredeemable title, and the same was the case with the surety. Indeed, it would seem, that in all cases where the purchaser was not an absolute stranger, the debtor might exercise his right to redeem the property—a privilege which has, however, been curtailed in most modern systems of law. (Burge's Foreign and Colonial Law, Vol. III, pp. 226-227.)

Another peculiarity, connected with the Roman law, was the right, which the mortgagee had, to interrupt the possession and prevent a trespasser from acquiring an absolute title to the property, by means of an action against the person in possession which might be brought even before the mortgage-debt fell due—a provision the absence of which from our law occasionally causes much embarrassment to the mortgagee. (Burge's Foreign and Colonial Law, Vol. III, p. 232.)

I have dwelt on the Roman law perhaps longer than I should have done, but the importance of the subject is, I trust, sufficient to excuse me for having detained you with a brief outline of one of the most interesting systems of law.

Pledge in
systems
founded
on Roman
law.

Exception.

The short account which I have given you of the Roman law, will also serve as a rough sketch of the law followed in our day in countries whose jurisprudence is founded on the civil law, and which constitute not only the greater part of Europe, including Scotland, but also a not inconsiderable portion of the new world. There is, however, one important deviation which deserves notice, the creditor not being permitted by most continental systems to exercise the power of sale except through judicial process. Another departure from the civil law may also be noticed in this place, the hypothecation of moveables, although sanctioned by Roman lawyers, not being, as a rule, allowed in any of the modern systems which are professedly founded on the civil law.

(Burge's Foreign and Colonial Law, Vol. III, p. 201; **LECTURE I.**
Code Napoleon, § 2119.)

There is one other system of law which has a very close interest for the Indian student; and a few words on the English law of mortgages will not, I trust, be wholly out of place. An English mortgage resembles in its features, as I have already had occasion to remark, the *Fiducia* of the later Roman law. In form it is a conveyance of land by the debtor to his creditor, with a proviso that, on repayment of the debt on a certain day, the conveyance shall be void, or, as is now more usually the case, that the creditor shall reconvey the estate to the debtor. If the money is not repaid on the appointed day, the mortgagee becomes at law the absolute owner of the property, but the Court of Chancery, which has almost exclusive jurisdiction over mortgages of land, regards the transaction only as a security for the repayment of the debt, and allows the mortgagor to redeem on payment of the principal, interest, and costs within a reasonable time, which has been reduced by a recent statute to twelve years from the date of the entry of the mortgagee, or of an acknowledgment by him of the title of the mortgagor. This right to redeem is known as the "equity of redemption," and, as I shall have occasion to explain hereafter, is guarded with peculiar jealousy by the Court of Chancery. But we must remember that the equity of redemption is not, as the name perhaps would suggest, a mere right. It is an "estate" in the land, and may be devised, granted, or otherwise alienated by the mortgagor, subject, however, to the right of the mortgagee to foreclose, when, under the decree of foreclosure, the estate passes to the mortgagee free of all incumbrances created subsequently to the mortgage.

At any time after the estate has been forfeited at law, the mortgagee has the right to call upon the mortgagor either to redeem, or, in default, to be for ever foreclosed from redeeming the property. This is accomplished by a bill of foreclosure, by which the mortgagee prays that an account may be taken of what is due to him on his security; and that the mortgagor may be decreed either to pay the amount, by a short day to be appointed by the Court, or to be foreclosed his equity of redemption. An account is taken, and a day for payment is appointed; the mortgagor being generally allowed for that purpose six months from the date of the certificate determining

English
law of
mortgage.

Equity of
redemption.

Bill of
foreclosure.

LECTURE I. the amount due to the mortgagee on his security. If the mortgagor makes default, the mortgagee obtains an absolute order for foreclosing, and the estate passes from the mortgagor to the mortgagee. A decree of dismissal of a bill for redemption, by reason of non-payment of the mortgage-money at the time appointed by the Court, also operates as a foreclosure.

Decree
for sale.

The Court, however, sometimes, instead of making a decree for foreclosure, directs a sale of the mortgaged property, when the purchase-money is applied in satisfaction of the mortgage, the surplus, if any, being paid to the mortgagor. In case of a deficiency, the mortgagee may recover the difference from the mortgagor. A recent statute has considerably extended the power of the Court to make a decree for sale instead of one for foreclosure, but the rule of the later Roman law, by which a foreclosure was never permitted, has not yet been adopted in England.

Remedies
of mort-
gagee may
be pursued
concurrent-
ly.

A mortgagee has not only the right to foreclose, but he may proceed to enforce at the same moment all the remedies to which, according to the nature of his security, he may be entitled. He may sue at the same time on his bond or covenant, bring his ejectment, and file his bill of foreclosure. If, however, the mortgagee should enter upon possession before foreclosure, he will be bound to account to the mortgagor for the rents and profits, while an action on the covenant will have the effect of opening the decree for foreclosure, that is, of letting in the mortgagor to redeem on the usual terms. I have just explained that after the mortgage has been forfeited by non-payment of principal or interest, the mortgagee is regarded as the absolute owner of the estate at law. He may, therefore, enter upon possession, but equity will compel him to account for every farthing of the rents and profits realized by him out of the estate.

Insufficient
security.

The best course for the mortgagee, when there is reason to suspect that the security is insufficient, is to obtain an order for sale, or, if that cannot be done, to sue on his bond or covenant first, and then to foreclose for the remainder.

A decree for sale would seem to be in all ordinary cases equally fair both to the mortgagor and mortgagee.

Sale the
more
equitable
remedy.

"The natural course, and certainly the most convenient and beneficial course," says Mr. Justice Story, "for the mortgagor, would seem to be for the Court to follow out

the civil law rules on this subject,—that is, to say, primarily and ordinarily, to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgage-debt; and, secondarily, to apply the remedy of foreclosure only to special cases, where the former remedy would not apply, or might be inadequate or injurious to the interests of the parties. This course has, accordingly, been adopted in many of the American Courts of Equity; and it is also the prevailing practice in Ireland. It is done without any distinction, whether there is a power to sell contained in the mortgage or not." "And in most, if not all, cases," adds the learned author, "it would be equally beneficial to the mortgagee, as it would prevent the delays incident to the common decree of foreclosure, which is liable to be reopened; and would also prevent any difficulty in obtaining the residue of the debt, when the mortgaged property is not sufficient to discharge it." (Story's Equity Jurisprudence, § 1025.)

Not only the mortgagor but all persons deriving an interest from him, whether by purchase, devise, or descent, may redeem the mortgage. It is on this ground that a subsequent incumbrancer may redeem a prior mortgage. A lessee of the mortgagor after the mortgage will similarly be allowed to redeem. The proprietary right of the mortgagor is very sharply defined in equity, and is fenced in by limitations which may not unreasonably be viewed as occasionally trenching on the just rights of the creditor. Thus, a Court of Equity would not only set aside, without the slightest hesitation, any transaction between the mortgagor and mortgagee involving harshness or unconscionable dealing, but would not even suffer the mortgagor to fetter in any way his right of redemption by any agreement with his creditor. The right of redemption is regarded in equity as a natural incident to a mortgage. A proviso, therefore, limiting the right of redemption to the lifetime of the mortgagor will be void in equity, so also will a proviso restraining the equity of redemption to the mortgagor himself or to the heirs of his body. (*Jason v. Eyres*, 2 Ch. Cas., 33; *Howard v. Harris*, 1 Vern., 190.) A right of redemption cannot also be taken away by an agreement at the time of the mortgage, that it should become absolute at the end of a limited period. So also, an agreement that the conveyance shall become absolute on payment of a further sum in case the money is not paid on the appointed

Who may
redeem.

Equity of
redemption
cannot be
restrained.

LECTURE

I.

Second
mortgage
without
notice.

day, will not be allowed in equity, nor can a contract for a collateral advantage prevent the exercise by the mortgagor of his right of redemption. (*Willett v. Winnell*, 1 Vern., 487; *Jennings v. Ward*, 2 Vern., 520.)

But equity extends its protection to the mortgagor still further, and refuses, for instance, to give to the mortgagee in possession any allowance for personal care or trouble in collecting the rents. It has been well said that the mortgagee in possession is a bailiff without a salary, accountable to the mortgagor but not paid by him. (*Davis v. Dendy*, 3 Mad., 170.)

I speak with diffidence, but the hypothesis does not seem to be untenable that the extreme solicitude, exhibited by the English Court of Chancery for the mortgagor, is a relic of the old horror of usury (*c*), which was so common at one time, not only in Europe, but also in the East. English equity is, as we all know, a fabric into whose web have been woven various bodies of law, and the spirit of the canon law, first infused into it by ecclesiastical lord-keepers and afterwards "consecrated" by statute, still lingers in the practice of the Court, and shapes its doctrines.

I may observe that by Statute 4 Wm. and M., c. 16, a mortgagor, who makes a second mortgage of the same property without giving notice to the intended mortgagee of the prior incumbrance, is absolutely barred of his equity of redemption as against such second mortgagee, and that a merely colourable addition of some comparatively insignificant property in the second mortgage will not take the case out of the statute. (*Stafford v. Selby*, 2 Vern., 589.)

Questions of priority, marshalling and tacking in the English law are complicated by the distinction between legal and equitable estates, and cannot be properly understood without some acquaintance with the history of English Equity Jurisprudence, and the mode in which the structure was gradually built up. I am obliged to pass over for the present these and similar topics connected with the English law of mortgage, and shall conclude only with a few observations touching the power of sale, which is generally to be found in English mortgages. Doubts were at one time entertained of the validity of an exercise of these powers of sale without the intervention of a Court

(*c*) For a short historical sketch of usury, see Lecky's History of the Rise and Influence of the Spirit of Rationalism in Europe. Vol. II, Ch. VI.

of Equity, or the concurrence of the mortgagor. These doubts, however, have long been set at rest; and it was enacted by 23 and 24 Vict., c. 145 (*d*), that the power might be exercised by every mortgagee unless it was negatived by an express declaration in the security. The mortgagee, acting upon the power, may sell the property mortgaged to him of his own authority, and without the intervention of a Court of Equity. If, however, the power of sale is not expressly given by the deed of mortgage, the mortgagee is bound to give at least six months' notice in writing to the person, or one of the persons, entitled to the property subject to the charge. When the power of sale is conferred expressly by the instrument of mortgage, there is generally a provision to the effect that the power is not to be exercised until the expiration of a previous notice to the mortgagor.

LECTURE
I.Power of
sale.

The mortgagee is regarded as a fiduciary vendor and is bound to adopt every precaution which would be taken by a prudent owner to get the best price for the estate. The exercise of the power, therefore, by the mortgagee for fraudulent purposes will be prevented in equity, either by restraining or setting aside the sale. But the mortgagee is not a trustee of the power for the mortgagor, and the Court will not enquire into his motives for exercising it. (*Nash v. Eads*, 25 Sol. J., 95, overruling *dicta* of Stuart, V. C., in *Robertson v. Norris*, 1 Gr. f., 421; 4 Jur., N. S., 155.) The mortgagee, however, may not buy the property himself, nor may his agent acting for him in the matter of the sale; but a puisne mortgagee is not under any such disability, and is at liberty to buy in the same way as a stranger, provided he takes no undue advantage of his position as mortgagee. (*Whitcomb v. Minchin*, 5 Mad., 91; *Martinson v. Clowes*, 21 Ch. D., 857; 51 L. J., Ch., 594; cf. *Pitamber Narayan Das v. Vanmali Shamji*, I. L. R., II Bom., 1.) But the mortgagee cannot proceed to exercise his power of sale upon tender to him of the principal, interest, and costs, and the tender may be made even in the auction-room. But the mere commencement of an action to redeem, will not prevent the sale.

Liabilities
of the
mortgagee.

Notwithstanding the recent statutory extension of the power of sale, the English law does not permit a sale if the creditor expressly engage with the debtor not to exercise

(*d*) Now replaced by 44 and 45 Vict., c. 41.

LECTURE the power. A different rule, as we saw, prevailed in the
 I. Roman law.

Influence
 of Roman
 on English
 law.

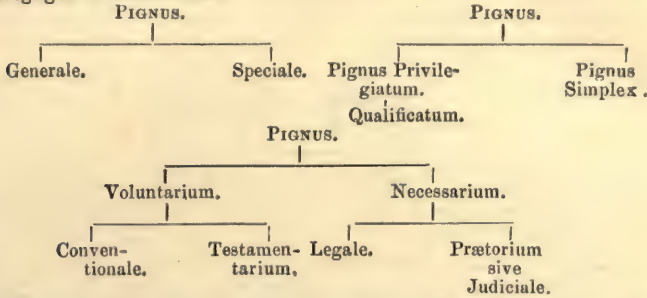
From the short sketch I have been able to give, you will observe that, although the English law of mortgage is in some respects "inelegant," the principles administered by the Court of Chancery have, in a great measure, shaped themselves on the model of the Roman law. The jurisprudence of England has been improved in many respects by the civil law; but nowhere is the beneficial influence of that system more perceptible than in the view taken by Equity of the real character of a mortgage transaction. It does not fall within the province of this lecture to trace the gradual growth of this branch of the equitable jurisdiction of the Court of Chancery. But there are few things, I may be permitted to observe, more remarkable in legal history than the successive steps by which the law of mortgage in England was placed on its present footing. It is true that the materials were ready to hand, but the fabric had to be reared amid much discouragement and opposition and it required the labours of several generations of Equity Judges to complete the structure (*e*). On the whole, English equity furnishes a remarkable monument of the triumph of common sense over professional prejudices, perhaps nowhere stronger than in the law. It marks the victory of natural justice over unmeaning technicalities, the triumph of enlightened reason over antiquated rules and worn-out formulas.

(*e*) The sarcastic observation of Selden, although it has long since lost its point, has passed into a proverb, while the opposition of Lord Coke to the jurisdiction of the Chancery Court has become matter of history. It seems that even so enlightened a Judge as Lord Hale, was not entirely free from that jealousy of Equity, which was so common at one time among English lawyers. The learned Judge is reported to have said with reference to the right of redemption enforced by the Court of Chancery in opposition to the rule of the common law, that "by the growth of equity on equity, the heart of the common law is eaten out." (*Roscarriek v. Burton*, 1 Ch. Cas., 219.)

NOTE A.

LECTURE
I.

The following diagram, together with the explanatory notes, taken mainly from Colquhoun's Civil Law, will clearly explain the classification of mortgages in Roman law.



The *pignus voluntarium* (voluntary pledge) is a constituted contract *depositum hominis*, whether by the debtor himself, or by another on his behalf, or by last will; but the *necessarium* (necessary) is the natural result of law or effected *juris dispositione*: the voluntary is subdivided into *conventionale* and *testamentarium*, and both may be express or tacit.

The *pignus conventionale expressum* (conventional and express) is founded on a *contractus pignoratitius* in pledges, or *pactum hypothecæ* in cases of hypothecation, and is constituted by the debtor declaring in express words that he grants a real charge upon a thing as a security for a debt incurred. The *pignus tacitum* (tacit) arises in the presumption of a transaction, or from the implication resulting out of a special contract, such as signing the document, making over the pledge, or ceding the possession of an object to a creditor on account of his claim.

Pignus testamentarium (testamentary) is constituted by the testator expressly granting a right to the pledge under his hand; and it is, moreover, *tacitum* when the nature of the testamentary disposition renders such pledge presumable by implication, as by bequeathing the annual revenue of an estate to a person, whereby he will acquire a tacit testamentary pignoratitian claim upon the estate itself.

The *pignus necessarium* (necessary) is subdivided into (1) *legale* (legal or understood), or that which the law necessarily implies, so that there is no necessity for bargaining for it expressly; neither will a bargain, to the contrary, be of avail, on which account it is said to be understood, and is therefore also called a tacit pledge; and into (2) *prætorium* (prætorian or judicial), otherwise termed *judiciale*, or that claim which the Judge assigns to one upon the goods of another for his security. (Colquhoun's Civil Law, §§ 1466, 1467.)

LECTURE II.

Hindu law of bailments—Conflicting texts—Early notions of pledge in Hindu law and gradual modification of these primitive notions—Relation of Hindu law to Comparative Jurisprudence—Tradition originally essential to validity of pledge—Validity of pledge, unaccompanied by delivery of possession, acknowledged in *Sib Chunder Ghose v. Russick Chunder Neogy*—Importance of Tradition in early law—Real and personal rights—Possession not necessary in later Hindu law—Priority of mortgage—Possession important when any questions touching priority arose—Conflicting texts cited side by side in Jaganath's Digest—Mr. Justice Grant's judgment observed upon—Jus gentium of the Roman law—Pactum Prætorium—Hypothecation in Hindu law—Early notions of security in Hindu law—Pledgee had in early times only a right of detention—Foreclosure, and power of sale, innovations—Classification of pledges by Hindu lawyers—Rule of Hindu law, interest not to exceed principal—Development of Hindu law of mortgage—Rule requiring tradition gradually fell into disuse—Commentaries on Manu—Hindu mode of interpretation—Text of Vrihaspati—Equity of redemption and sale by judicial process—Gradual improvement of Hindu law—Hindu law of mortgage in its maturity—Beneficial pledge and pledge for custody—Important distinction between mortgage with and mortgage without possession—Nature of Dristi-Bandhak—Priority of mortgages in Hindu law—Right of pledgee to sue when pledge is destroyed without his default—Analogous rule in the Code Napoleon—Equity of redemption of a usufructuary mortgage—Rights of mortgagor—Validity of second mortgage—Character of Hindu law of mortgage.

I NOW come to the Hindu law of securities,—a branch of our law, which, I venture to think, may be placed by the side of the most advanced systems of jurisprudence.

Hindu law
of bail-
ments.

An accomplished lawyer, whose memory will be always dear to Sanskrit learning, in speaking of our law of bailments, has said: "It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiased reason in all ages and nations seldom fails to draw, in such judicial inquiries as are not fettered and manacled by *positive* institution; and although the rules of the *pundits* concerning *succession to property*, the *punishment of offences*, and the *ceremonies of religion* are widely different from ours, yet, in the great system of *contracts*, and the common intercourse between man and man, the Pootee of the *Indians* and the Digest of the *Romans* are by no means dissimilar." (An Essay on the Law of Bailments, by Sir William Jones, p. 114.) The law, however, which moved the admiration of Sir William Jones

has ceased, in one sense, to be living law, and it is to be sought at the present moment, not in our books of reports, but in the texts of our sages, and in the writings of the successive jurisconsults by whom Hindu law was gradually moulded into system. It is to that law, the truly indigenous system of the country, that I propose to call your attention in the present lecture.

LECTURE
II.

I must, however, warn you at the outset that it is by no means easy to thread one's way through the labyrinth of conflicting texts in which the law is sometimes involved. I intend to confine myself only to some of the broader features of this branch of Hindu jurisprudence. But even with this limitation, I cannot but feel a certain degree of distrust in the soundness of my conclusions,—a distrust, I may venture to say without presumption, perhaps, inseparable from the nature of the inquiry upon which we are now engaged.

Conflicting
texts.

I have already said that the authorities upon which our conclusions must mainly rest, are not unfrequently conflicting. The key to this conflict is to be sought in the fact that we have to trust to texts which, although sometimes placed side by side, are of various antiquity,—a fact which must be carefully borne in mind by the student of Hindu law. Whatever truth there may be in the reproach that the Hindus are an unprogressive race, even the most careless student of our law must admit that the charge must be received with considerable reservation. Hindu law is, no doubt, archaic, but there are portions of it which furnish unmistakable evidence of maturity. A not very friendly critic has said: "There is in truth but little doubt that, until education began to cause the Natives of India to absorb Western ideas for themselves, the influence of the English rather retarded than hastened the mental development of the race. There are several departments of thought in which a slow modification of primitive notions and consequent alteration of practice may be seen to have been proceeding before we entered the country; but the signs of such change are exceptionally clear in jurisprudence, so far, that is to say, as Hindu jurisprudence has been codified. Hindu law is, theoretically, contained in Manu, but it is practically collected from the writings of the jurists who have commented on him, and on one another." (Maine's *Village Communities*, p. 46.)

Gradual
modifica-
tion of pri-
mitive no-
tions in
Hindu law.

LECTURE

II.

In examining Hindu law, we must, I repeat, carefully distinguish the rudimentary stages of legal thought from its maturity; and it is because this has not always been done, that Hindu law has attracted to itself a cloud of undeserved prejudice. It may be said that it is not always possible to obtain direct evidence of the relative antiquity of the texts of Hindu law; but in this, as in other instances, a knowledge of comparative jurisprudence will greatly assist us in "unravelling the tangled skein" of legal history. Comparative jurisprudence is to the lawyer what comparative grammar is to the philologist; and if the results yielded by the latter are more certain, it is only because its inductions are founded upon a wider basis. The conjecture, however, may be hazarded without rashness or presumption, that Hindu law will, at no distant date, render the same service to jurisprudence that Sanskrit has already done to the sister science of philology.

Relation of
Hindu law
to compara-
tive juris-
prudence.

I will illustrate my position by reference to a question connected with the Hindu law of securities which has provoked no little conflict of opinion.

We saw that in Roman law a pledge was originally required to be accompanied by possession, and that it was only very gradually that hypothecation found a place in the jurisprudence of Rome. In the case of *Sib Chunder Ghose v. Russick Chunder Neoghy* (Fulton's Reports, p. 36), the question arose, whether a pledge, unaccompanied by possession, was valid according to Hindu law. Conflicting texts were cited in the argument. The plaintiff relied upon the text of Vrihaspati,—“Of him, who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased.” (Colebrooke's Digest, Vol. I, p. 211, § 126.) The defendant relied upon the text of Yājñavalkya: “By the acceptance or actual possession of a pledge the validity of the contract is maintained.” (Colebrooke's Digest, Vol. I, p. 166, § 96.) So also, Vyasa says: “Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and *not otherwise*.” (Colebrooke's Digest, Vol. I, p. 211, § 125.) The Judges were divided in opinion; but the majority of the Court held that whatever might have been the case in early times, the later Hindu law clearly sanctioned the validity of a

Necessity of
delivery of
possession
in a Hindu
pledge.

pledge, although unaccompanied by possession; and they relied as well upon some of the written texts of Hindu law as upon the general usage of the country, the overshadowing claims of which are acknowledged by every Hindu lawyer. One learned Judge, Mr. Justice Grant, however, was of a different opinion, and I shall presently call your attention to the reasons given by him in his judgment as a striking illustration of the delusions which had at one time crystallized, in a more or less perfect form, round the so-called "law of nature;" but, before I do so, I must enter upon a discussion, which may perhaps at first sight seem to be somewhat out of place in the present lecture, but which a closer examination will, I trust, show to be relevant. I allude to the important part played by tradition or delivery of possession in early law.

LECTURE
II.

It seems that in the rudimentary stages of legal thought, there was no distinction between a contract and a conveyance. Sir Henry Maine has shown that, in the Roman law, contracts, as well as transfers, were originally known by the same name, and were accompanied by the same formalities. In course of time, however, the notion of a contract disengages itself from the notion of a conveyance, and then we have the well-known distinction between "real" and "personal" rights. (Ancient Law, Chap. IX.) A "real right," or, *jus in rem*, is, as you are aware, a right availing against the world at large; while a "personal right," or, *jus ad rem*, is a right availing only against some determinate person or persons. Take the case of an executory contract of sale. If A agrees to sell a parcel of land to B, B acquires a personal right against A to compel him to fulfil his contract; or if that is impossible, B can compel A to compensate him for the breach. But B would acquire no right whatever as against third persons who might withhold the land from him, the right being a mere personal right, arising out of an agreement. But if A, in pursuance of the contract, conveys the land to B, B is said to acquire a real right, which he can assert against third persons. Now in ancient law there could be no valid conveyance of land, unless the transaction was accompanied by tradition or delivery. Possession was, therefore, an essential element in the acquisition of a real right. "The acquisition of possession," says Mr. Justice Markby, "has in all systems of law, European and Oriental, been always treated as a most

Real and
personal
rights.

Possession
necessary
for the
acquisition

LECTURE II.
of a real right.

important element in the acquisition of title. Under the Roman law, it was absolutely essential,—*traditionibus et usucapionibus non nudis pactioibus rerum dominia transferuntur*,—and this is what a Roman lawyer considered as the *natural* by which he meant the *universal* mode of acquiring property. The same notion prevailed, and still prevails to a greater or less extent, in every country in Europe. The French Code recognizes it emphatically in the phrase “*enfait de meubles la possession vaut titre*.” The necessity in some cases of delivery of possession in order to complete title is also, as is well known, recognized by the Mahomedan law; and there is no ground for saying, as far as I can see, that its effect is ignored by the Hindu law. On the contrary, I imagine, the title of a purchaser from a person who is not the true owner, which, under certain circumstances, *is*, or certainly *was*, recognized by the Hindu law (see Jagannatha's Digest, Book II, clause 2, § II, para. 48), depended entirely on possession. In the Mitakshara, Chapter III, §§ 3 to 6 of the portion contained in the work of W. H. Macnaghten, there is a very elaborate discussion on possession; and in section 6 there occurs this passage: “It has been shewn that possession, when accompanied by a title, is evidence of right; but lest it should be supposed that a title without possession affords equal proof, it is declared, ‘where there is not the least possession, there the title is not weighty.’ Such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight.” These passages seem to me to shew that, even in Hindu law by obtaining possession, a man not only obtained enjoyment under his title, but that he went through a ceremony which in some cases was highly efficacious in completing his title.” (*Salim Shaikh v. Boidonath Ghuttack*, XII Suth. W. R., 217; III Ben. L. Rep., A. C. J., 312.)

Various explanations have been suggested of the origin of this rule. But whatever might be the origin of the rule, there can be very little doubt that it was retained in almost every system of law, because it served a useful purpose. As a conveyance transferred a real right, it was very desirable that it should take place openly, and change of possession was, perhaps, best calculated to accomplish this object. The inconvenience of the proceeding, however, must have suggested the gradual relaxation of the rule; and in the

LECTURE
II.

maturity of jurisprudence, tradition loses its original importance, and is almost everywhere, in time, replaced by a system of registration of titles. It has been thrown out by a learned writer that the first relaxation probably took place in the case of mortgages, and an examination of the Roman law would certainly seem to show that, in the Western world at any rate, this was the case (Markby's Elements of Law, §§ 529, 530). The Roman prætors, in recognizing the validity of a hypothecation, broke in upon, what I may call, the rule of the common law,—a rule which was retained in Roman jurisprudence to the last, by which no real right could pass without tradition. It is not possible to say whether precisely the same course of development was followed by the Hindu law. There can, however, be little doubt that in mature Hindu law, the rule requiring tradition had fallen into disuse, and that a real right, whether by mortgage or sale, could be conferred by a mere expression of the intention of the parties. A critical examination of the subject would be beyond the scope of the present lecture; and I shall content myself only with citing a passage from the Mitakshara (Chap. III, § 6, paras. 4, 5), which shows the state of the Hindu law on the point when that treatise was compiled: "The acceptance of gold, cloths, &c., being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as a three-fold acceptance; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession: otherwise the gift, sale, or other transfer is not complete. A title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it, or with such corporeal acceptance. But such is the case only, when of these two the priority is undistinguishable; but *when it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence.*" (Macnaghten's Hindu Law, Vol. I, pp. 218-219.) (a.)

Possession
not neces-
sary in
later Hin-
du law.

Priority of
mortgage.

(a) A somewhat different view has, however, been taken by the Bombay High Court, and, according to the most recent decisions of that Court, a transaction not completed by delivery of possession, must, in theory at least, be regarded as incomplete and cannot generally speaking, be enforced as against a purchaser for value without notice, except where the rigour of the old Hindu law has been relaxed by local usage. But the Bombay High Court holds at the same time that

LECTURE
II.Conflicting
texts.

I have dwelt at some length upon the subject of possession, because Hindu law cannot be properly understood without some general knowledge of comparative jurisprudence, which alone can furnish us with a key to the apparent conflict in our written law. In the Digest of Jagannath, side by side with texts which belong to the infancy of law, we find others which belong to a much more advanced stage of legal thought. Our knowledge of the gradual progress of law in the Western world will, however, enable

registration atones for the absence of possession, for which it is a sufficient substitute. The law on this subject is thus formulated by Westropp, C.J., in *Lakshmandas Sarupchand v. Dasoat*, I. L. R., VI Bom., 168, F. B.; cf. pp. 176—181.

It is a general but not an invariable rule, that possession in the grantee is essential, amongst Hindus and Mahommedans, to the complete transfer, either by gift, sale, or mortgage. (See the cases cited in the judgment.) To this general rule as to necessity for possession, the following exceptions have been permitted, viz.—

First—Cases of sán-mortgage in Guzarut.

Secondly—Cases in which the only contending parties are the mortgagor or volunteers claiming under him, and the mortgagee or persons claiming under him; or, the vendor or volunteers claiming under him, and the vendee or persons claiming under him.

Thirdly—Cases in which the subsequent mortgagor or purchaser became such, with actual notice of the earlier mortgage or sale, without possession.

Fourthly—If the mortgagee be in possession, the mortgagor, though out of possession, may charge or sell his equity of redemption.

Fifthly—Where the mortgagor has not put the mortgagee in possession, and subsequent to the mortgage, has been wrongfully dispossessed, the mortgagee may bring a suit against the wrong-doer for possession of the mortgage-land.

Sixthly—Possession by a judgment-debtor, having a good title, is not necessary to validate a judicial sale of his lands.

Seventhly—Possession by the vendee, who becomes such at a judicial sale, is not necessary to validate the sale to him, as against subsequent attaching creditors under money-decrees, or, as against purchasers at the sale under such decrees.

Eighthly—The purchaser at a judicial sale may re-sell, without previously taking possession.

Cf. *Sobhagchand Zulabchand v. Bhaichand*, I. L. R., VI Bom., 193; *Bapuji Balal v. Satya Bhama Bai*, I. L. R., VI Bom., 490; *Naran Purshotam v. Dolatram Virchand*, I. L. R., VI Bom., 538; *Raja Sukhib Perhlad Sein v. Baboo Budhoo Sing*, XII Moore Ind. App., 275; S. C., II Ben. L. Rep. (P. C.), 111; *Ranee Bhobsoondree Dasscah v. Issur Chunder Dutt*, XI Ben. L. Rep., 36; S. C., XVIII Suth. W. R., 140. But, see *Gungahurry Nundee v. Raghubram Nundee*, XIV Ben. L. Rep., 607; S. C., XXIII Suth. W. R., 131; *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R., VIII Calc., 597, F. B.; *Golla Chinna Guruvuppa Naidu v. Kali Appiah Naidu*, IV Mad. H. C. Rep., 434; *Sadagopa Chariyar v. Ruthna Mudali*, V Mad. H. C. Rep., 457. Cf. *Varden Seth Sam v. Luckpathy Royjee Lallah*, IX Moore Ind. App., 303; but see *Narain Chunder Chuckerbutty v. Dataram Roy*, I. L. R., VIII Calc., 597; *Ramasami v. Maremuttu*, I. L. R., VI Mad., 404.

LECTURE
II.

us to determine with tolerable certainty the historical order of the different authorities upon which our conclusions must rest. The inductions of comparative jurisprudence are as yet, no doubt, founded upon a limited basis, but it may be safely affirmed that the written texts of Hindu law, which require the delivery of possession by the mortgagor to the mortgagee, are older than those which do not insist upon tradition. To borrow a figure from geology, the written texts which require the delivery of possession, constitute the lower, while those that dispense with it, constitute the upper strata, as it were, in the formation of Hindu Law. It seems to me, with very great deference, that this simple fact is not sufficiently attended to by Mr. Justice Grant, in his elaborate judgment, in the case of *Sib Chunder Ghose v. Russick Chunder Neoghy*, in which the learned Judge is reported to have said: "In questions, therefore, which concern the laws of countries into which the feudal law has not been introduced, it is of importance to begin by ascertaining what the Roman law was upon those questions, because it is the best digest of the rules which affect the rights and obligations of mankind according to the natural principles common to all nations. If we find the law laid down in any treatise upon the subject which is in question, conformable to the principles of the *Jus gentium* stated in the Roman law, we are entitled to believe that it is correctly laid down. If we find it declared to be otherwise, we are driven to search for some reason in the circumstances of the people, which shall account for their institutions in that matter differing from those of the rest of mankind. If we find authorities in their law differing and equally balanced, we must believe those to be correct which agree with the general principles of natural law—still more if we find the majority agreeing with those principles and expressing themselves clearly, and the minority apparently differing from them and expressing themselves more obscurely and less decidedly." (Fulton's Reports, pp. 43-4.)

Jus gentium of the Roman law.

Mr. Justice Grant then proceeds to examine what he calls "the general principles of natural law," as they are to be found in the Roman law. After stating that there could be no valid pledge without possession, whether in the case of land or of moveables, the learned Judge, referring to the hypothecation of the later Roman law, says: "The *Jus Hypothecæ* was limited to certain

LECTURE II. securities, chiefly, if not solely, over immoveable property, and to certain cases, and under certain regulations, afforded by the Equity of the prætor. It was *Pactum Prætorium*, not arising out of general principles of law, or forming part of their common law, or *jus non scriptum*, but a municipal institution introduced by that magistrate. Puffendorff confines this security of pledge expressly to the giving the creditor some certain thing in pawn till the debt be paid, and considers the hypothec of the Romans to have been confined to immoveable property. 'The distinction,' says Sir William Jones, 'between pledging where possession is transferred to the creditor, and hypothecation where it remains with the debtor, was originally derived from the Attick law.' In what circumstances the Athenians admitted the hypothecation, we do not know. But that with them, as with the Romans, delivery of possession was necessary to constitute pledge by what we may call their Common Law, there seems no doubt. This, therefore, was the law of the whole ancient world of civilized Europe, extending as well to immoveable as to moveable property *secundum jus gentium*. And it is also the law of the whole of modern Europe in regard to moveables." (Fulton's Reports, pp. 45-6. See *Collydass Gangopadhaya v. Shibchunder Mullick*, Morton's Reports, 111. Cf. *Sibnarain Ghose v. Rassikchundra Neoghy*, Morton's Reports, 105.) The learned Judge, therefore, comes to the conclusion, that tradition is necessary to the validity of a pledge in Hindu law—a conclusion which, we are told, is in conformity with "the general principles of natural law." If it were not for the peculiar views about the law of nature, so widely prevalent at one time, Mr. Justice Grant could hardly have failed to perceive, that the Hindu law might have been developed in course of time in the same manner, as the Roman law was developed by the introduction of the hypothecation. The evidence which I have just analysed, though fragmentary and, it must be confessed, occasionally of dubious value, shows, on the whole, that such modification did actually take place in our law, and, as you will presently see, also in the Mahommedan law by a process which may be described as one of gradual absorption. We have here an instance of juridical improvements in the West repeating themselves in the East.

Hypothecation in Hindu law.

We have seen how in one respect the Hindu law slowly matured itself. I will now proceed to discuss another

question which has also given rise to considerable conflict of opinion,—a conflict which has added not a little to the evil reputation for uncertainty which the Hindu law has acquired.

LECTURE
II.
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We saw in the last lecture that in the Western world a security was originally regarded only as a means of compelling the debtor to fulfil his engagement, and that it was only very slowly that Roman jurisprudence emancipated itself from this conception. The questions naturally suggest themselves.—Were there any analogous movements in Hindu law? Are there any traces in Hindu law of the primitive notions of a security? Now, an examination of our law shows, as I have already said, that a real security was a comparatively late development in Hindu jurisprudence. The earliest record of Hindu law which we possess, discloses that stage of legal thought in which a security is limited to a bare right of detention. Early notions of security in Hindu law. Manu says: "Whatever the length of time, a pledge may neither be sold nor assigned by the pledgee." (Sir William Jones's Manu, Ch. VIII, § 143.) Here we find the very same restrictions upon the rights of the creditor as we found in early Roman law. In course of time, however, these restrictions were withdrawn, and the security of the pledgee in Hindu law became a true real security. The change was accomplished by the successive juriconsults, by whom, in the absence of direct legislation, the improvement of our law was carried on. The authority of Manu is never openly disowned, and yet we find in the mature Hindu jurisprudence the rule, laid down in the code, reduced to very narrow limits; the dictum of Manu being confined to the single case of a pledge in which the creditor is permitted to receive the profits in lieu of interest, and the right to redeem the pledge is, by the express agreement of the parties, unlimited as to time. (Colebrooke's Digest, Vol. I, pp. 194-199, § 117.) In order to explain myself, I ought to state that, in the later Hindu law, a pledge might either be limited as to time, or it might be for an indefinite period. It might also either be a pledge for use, or for mere custody. In the pledge for a limited time, as opposed to a pledge for an indefinite time, the property, by the express terms of the agreement, passed to the creditor on the default of the debtor. Classification of pledges in Hindu law. In the pledge for use, as distinguished from a pledge for custody, the pledgee was entitled to use the thing pledged

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II.
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to him, but no interest was permitted to be taken by the creditor in addition to the usufruct. It is not necessary to discuss the rules peculiar to each of these classes. All that I wish to observe is, that the division of securities into pledges for a limited period, and pledges for an indefinite time, marks an advanced stage of juridical thought. No trace of any such classification is to be found in Manu, although the distinction between beneficial pledges and pledges for custody, is pointed out in the code. In the maturity of Hindu jurisprudence, the creditor possessed a real security in every case in which the pledge was for a limited period, and in some cases, also where the pledge was for an indefinite time. In the case of a pledge for an indefinite time, if the pledge was one for custody only, and not for use, the property passed to the creditor when the debt doubled itself, Hindu law prohibiting the accumulation of interest exceeding the principal. (Colebrooke's Digest, Vol. I, pp. 202-204, § 119.) The law, however, went a step further when it allowed the creditor to sell the pledge and repay himself out of the proceeds, even when a forfeiture was guarded against by the express stipulations of the parties. The pledgee was entitled to exercise this right, if the pledge happened to be of the class known as a pledge for custody, and the debtor failed to redeem after the interest had become equal to the principal. It would seem that in the last case the creditor only possessed the right to *sell* the pledge. In every other case, a sale was entirely at the option of the mortgagee.

Develop-
ment of the
Hindu law
of mort-
gage.

The foregoing sketch shows how a pledge in Hindu law, limited by Manu to a bare right of detention, ripened, in course of time, into a true real security. This was accomplished by a series of limitations, imposed upon the very broad proposition which we find in the code. It is not always possible to trace the successive stages of the progress of Hindu law; but in the present case, I think, the task can be accomplished with tolerable certainty. The first improvement appears to have been the introduction of a clause, by which the debtor agreed to the property in the pledge passing to the creditor upon default. The division of pledges, which we find in the later Hindu law, into pledges for a limited and pledges for an unlimited period, is nowhere alluded to by Manu, and there can, I think, be but little doubt, that the classification denotes a very great advance in legal thought. Partly by calling in this dis-

tion, and partly by help of the distinction between pledges for use and those for mere security, the successive commentators pared down the rights of the pledgor to what would seem to be reasonable limits. The commentators, who, as I have already said, always professed the very greatest veneration for the text of the code, explained the dictum of Manu as having reference only to cases in which there was no express agreement that the pledge should be forfeited on the default of the debtor. This was the first of the series of limitations by which the application of the text of Manu was gradually narrowed. Chandeswara, Vachaspati, Bhavadeva, all concur in the opinion that the text applies only to a pledge in which there is no special agreement by which the right of the debtor is liable to forfeiture. (Colebrooke's Digest, Vol. I, pp. 194—199, § 117.) It was not long before the law was further developed. The process by which this was accomplished was by presuming the existence of a clause of forfeiture when the debt doubled itself in the case of a pledge for custody. The text of Manu was now narrowed down, by an ingenious construction, only to the single case of a beneficial pledge, in which no time was limited for redemption. I have, however, passed over an intermediate stage in the development of the law, in which the pledgee for custody was entitled to use the pledge after the accumulation of interest to the extent permitted by the law. The latest improvement, as I have already said, consisted in the right, which the law gave to the creditor, to sell the pledge, even when there was an express stipulation that the property should not be forfeited although the debt was doubled. I shall now call your attention to a discussion in the Mitakshara (Chap. VI, Sec. 6, § 58), which, while it confirms the truth of the proposition that a real security was a late product of Hindu jurisprudence, offers an apt illustration of the method of interpretation followed by Hindu commentators. Referring to the text of Vrihaspati (b)—“Gold having doubled, and the stipulated period having expired, the creditor becomes owner of the pledge after the lapse of fourteen days. If the debtor repays the amount within that time, he shall get back the pledge,”—the author of the Mitakshara says: “A question arises that the pledge is

LECTURE
II.Commen-
taries on
Manu.Hindu
mode of
interpreta-
tion.

(b) This text is attributed to Vrihaspati by the author of the Mitakshara; but Jagannatha attributes it to Vyasa. (Colebrooke's Digest, Vol. I, p. 192, § 116.)

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II.

forfeited is not consistent, because there is neither a gift nor sale, &c., by which the right of the debtor can cease; neither is there an acceptance, nor purchase, &c., by which the right of the creditor can accrue; and that it is also contrary to the text of Manu—‘However long the time may be, neither an assignment, nor a sale of a pledge, can be made.’ ‘However long the time may be,’ means for whatever length of time the pledge has been in the custody of the pledgee. ‘Assigned’ means pledged to a third person by the pledgee. Hence, by the prohibition of assignment and sale, it is evident that the right of the pledgee does not accrue. Answered. It is a well-known popular notion that a transfer by pledge is a qualified cause of the loss of right; and acceptance of the pledge, a qualified cause of the creation of right. Consequently, after the debt has doubled, and the stipulated time has arrived, the right to satisfy the debt ceases, and by virtue of this text, the debtor’s right is lost for ever, and that of the creditor accrues. Nor is it contrary to the text of Manu—‘After no length of time, neither an assignment, nor a sale of the pledge, can be made.’ For this is said by the sage (Manu) on the subject of a pledge for use, as he commences by saying: “If he take a beneficial pledge, he must have no other interest on the loan.”

Gradual
improvement of
Hindu law.

You will remember that the passage in Manu was expounded by some commentators as applying only to pledges, whether for use or custody, where there was no express agreement that the property should be forfeited on default. But we find that the author of the *Mitakshara* places a still more restricted interpretation on the text of Manu. This was the way in which Hindu law was gradually improved, under conditions which were certainly not very favourable to progress. Referring to the development of law by successive comments by juriconsult upon juriconsult, Sir Henry Maine says: “Even so obstinate a subject-matter as Hindu law, was visibly changed by it for the better. No doubt the dominant object of each successive Hindu commentator is so to construe each rule of civil law as to make it appear that there is some sacerdotal reason for it; but subject to this controlling aim, each of them leaves in the law, after he has explained it, a stronger dose of common sense and a larger element of equity and reasonableness than he found in it as it came from the hands of his predecessors.” (*Village Communities*, p. 47.)

We have now arrived at the state in which the Hindu law stood in its maturity. We find that if the debtor committed default, the property in the pledge passed to the creditor, who might, however, in the exercise of his discretion, sell the pledge; when, if there was a surplus, the debtor became entitled to it. In the case, however, of a pledge for custody, where there was an express stipulation against forfeiture, the creditor could not foreclose, but could only exercise the right of sale. The only case in which there could be neither a sale nor a foreclosure, was when the pledge was of the description known as a "beneficial pledge," and the right of redemption was, by the express agreement of the parties, not limited to any particular period. The creditor was in no danger of losing his interest, and the law, therefore, left him to the terms of his contract with the debtor.

LECTURE
II.Hindu law
of mort-
gage in its
maturity.

It would seem that a sale of the pledge through judicial process was not wholly unknown to the ancient Hindu law. Katyayana says: "When the pawner is missing, let the creditor produce his pledge before the king; it may then be sold with his permission: this is a settled rule. Receiving the principal with interest, he must deposit the surplus with the king." (Colebrooke's Digest, Vol. I, p. 206, § 122.) This text, therefore, shows that the creditor was not, in all cases, entitled to sell the pledge of his own authority. It is curious to observe that a somewhat similar provision existed in the Roman law.

We have already seen that, in later Hindu law, it was not necessary that a pledge should be accompanied by possession. It must not, however, be supposed that a mortgagee, who omitted to take possession, was in the same favourable situation as one who took the precaution of publishing his mortgage, if I may use the expression, by taking possession of the property pledged to him. Whenever any question of priority arose, the mortgagee in possession, though his mortgage might be later in date, was always preferred to the mortgagee who had neglected to enter upon possession. "If two men, to whom the same property has been pledged, enter into a contest, to him who has possessed the land it shall belong, if no force were used." (Smṛiti, cited in the Ratnacara; Colebrooke's Digest, Vol. I, p. 217, § 131.) It would seem, from the use of the expression "without force," that the possession must be one acquired in good faith, and the text seems to limit the

Distinction
between
mortgagee
with, and
mortgagee
without,
possession.

LECTURE II. preferable right of the puisne incumbrancer in possession, only when the money has been advanced without notice of the prior mortgage.

Nature of
Dristi-
Bandhak.

While upon this subject, a few words on a kind of mortgage very common in the Southern and Western Presidencies will not perhaps be wholly inappropriate. This is the Dristi - Bandhak, or a mortgage of visible things. In this kind of mortgage, the mortgagor remains in possession till default is made by him, when the mortgagee becomes entitled to enter upon possession as absolute owner of the property. It is with reference to this class of mortgages that Sir Thomas Strange says: "It may be doubted whether this mode of pledging be not originally Hindu instead of Attic as has been supposed." (Hindu Law, Vol. I, p. 288.) The existence of this class of mortgages shows very clearly that Hindu law had long outgrown that stage of juridical thought in which tradition is regarded as essential to the constitution of a mortgage.

I have already shown how, in certain cases, the priority of mortgages was determined by possession. I shall now state some other rules governing priority in Hindu law. A mortgage in writing was preferred to a parol mortgage. "If a pledge, a sale, or a gift of the same thing be alleged to be made before witnesses to one man, and by a written instrument to another, the writing shall prevail over the oral testimony, because one contract only is maintained." (Smriti, Colebrooke's Digest, Vol. I, pp. 220-21, § 134.) Another rule is to be found, by which a writing in which the property mortgaged is clearly defined, is preferred to one in which there is no such specification of the property intended to be pledged. "But, if a man first mortgage land without noticing all circumstances, and afterwards mortgage it with express description by name and the like, that writing which contains an express distinction shall prevail. If a field or a house be described in a written instrument by its limits, and if villages and the like be so described, the contract is valid. When a distinction is expressed in a writing to one man, and no distinction to another, the express distinction, says Katyayana, shall preponderate." (Smriti, Colebrooke's Digest, Vol. I, p. 222, § 135.) A general hypothecation does not seem to have been recognized by the Hindu law. A text cited in the Digest says,—“If a man pledge his property, unexhibited and undescribed as to its nature, and consequently im-

Priority of
mortgages
in Hindu
law.

perceptible like the subtile element, that shall not be considered as a definite pledge." (Colebrooke's Digest, Vol. I, p. 225, § 136.) There are one or two more points in connection with Hindu law which deserve notice. "Mortgaged land," says Yajñavalkya, "being carried away by a rapid stream, or being seized by the king, another pledge of land must be delivered, or the sum lent must be restored to the lender." (Colebrooke's Digest, Vol. I, p. 168, § 100.) Similarly, Katyayana says: "Whatever pledge has been lost by the act of God or the king, the debt for which it was given shall be paid by the debtor to the creditor with interest." (Colebrooke's Digest, Vol. I, pp. 169-170, § 100.) Vrihaspati also says, "If a pledge be destroyed by the act of God or of the king, the creditor shall either obtain another pledge, or receive the sum lent together with interest." Narada says,— "When a pledge, though carefully preserved, is spoiled in course of time, another pledge must be delivered, or the amount of principal and interest must be paid to the creditor." (Colebrooke's Digest, Vol. I, pp. 165-166, §§ 93, 95.) An analogous rule is to be found in the French Code, Article 2131 of which says: "In like manner, in case the present moveables or immoveables, subjected to mortgage, have perished, or sustained deterioration in such manner, that they have become insufficient for the security of the creditor, the latter shall be permitted either to sue immediately for repayment or to obtain an additional mortgage." (Cf. s. 68, cl. (b) and cl. (c) of the Transfer of Property Act.)

LECTURE
II.Destruction of
pledge.Code Na-
poleon.

The Hindu law did not permit the redemption of a usufructuary mortgage for a definite period before the expiration of the term. The rights of the mortgagor are, no doubt, guarded with scrupulous care, but the sentimental tenderness for the debtor, which sometimes overlooks the just rights of the creditor, finds no place in our ancient law. "When a house or field, mortgaged for use," says Vrihaspati, "has not been held to the close of its term, neither can the debtor obtain his property, nor the creditor obtain the debt." The lawgiver, however, adds: "After the period is completed, the right of both to their respective property is ordained; but, even while it is unexpired, they may restore their property to each other by mutual consent." (Colebrooke's Digest, Vol. I, p. 199, § 118.)

I shall conclude with a few observations on the general rights of the mortgagor. The mortgagor, notwithstanding

Rights of
mortgagor.

LECTURE II. the mortgage, could deal with the property as owner, subject to the limitation that he was not permitted to do anything which might impair the security of the mortgagee. He could make a gift or sale of the property, and the transferee would, in either case, have the right to redeem the mortgage. Raghunandana, in his *Dāyatattwa*, says: "Thus also if the pledge be not redeemed by reason of death or the like of the seller or donor, it may be redeemed by the buyer or donee, because a right equal to that of the former owner has been generated by the sale or gift. In such a case, if a dispute arise as to the source of the right, then the buyer or the donee (who is admitted as such) is required to prove his possession, and not the commencement of his title." (*Dāyatattwa*, translated by Golap Chandra Sarkar Sastri, § 16, p. 32.) The passage is also interesting as showing, that hypothecation was a common mode of mortgaging property, at least in Bengal, in the sixteenth century.

Validity
of second
mortgage.

A text of Vishnu is sometimes cited to show that a second mortgage was not permitted by the Hindu law. "He who has mortgaged," says Vishnu, "even a bull's hide of land to one creditor, and without having redeemed it, mortgages it to another, shall be corporally punished by whipping or imprisonment; if the quantity be less, he shall pay a fine of sixteen *suvernas*." (Colebrooke's Digest, Vol. I, p. 216, § 129.) The text, however, would seem to point to a fraudulent second mortgage, executed by the debtor without disclosing the prior mortgage,—a fraud which the Hindu law, in common with other systems, is careful to guard against. The reasoning of the Bengal lawyer would seem to show, that no exception could be taken to a second mortgage honestly created by the debtor; while the extremely severe penalty attached to a violation of the duty which the text imposes on the mortgagor, also points to the same conclusion.

Character
of Hindu
law of
mortgage.

I have now brought down the history of Hindu law to its maturity. I regret that the limits I am obliged to propose to myself, will not permit a fuller account. The Hindu law of security, however, deserves very careful study, and I trust I shall not be accused of an idle pride in my own national system, if I venture to affirm that although not quite so perfect as the Roman law, it is still, on the whole, a model of good sense and logical consistency.

LECTURE II.—(Continued.)

Mahommedan law of mortgage—Gradual assimilation with Hindu law—Difference between Mahommedan law and Hindu and English law—Analogy between Mahommedan law and Roman law—Rahn, literally detention—Pledge invalid unless followed by transfer of possession—Conflicting opinions of Mahommedan lawyers on the point—Possession being essential to the validity of a pledge, things incapable of seizure cannot be pledged—Things which could be sold, but of which possession could not be given, could not be pledged—The contrary opinion held by Shafei—Pawnee lending the pledge to the pawner, is freed from responsibility during the loan, but he may resume it at pleasure, and then his responsibility reverts—A debtor may transfer his debt upon a property in the hands of another person—Seizin not necessary under the Maliki law—An equity of redemption cannot be the subject of a gift, though it can be sold—Observation that this is probably a narrow construction of the Hanafi law—Power of sale in Mahommedan law—Rights of pledger—Rights of pledgee—Consequences of loss or destruction of pledge—The expenses of custody of the pledge rest upon the pawnee, and those of preservation upon the pawnor; taxes are defrayed by the pawnor—Tithes must similarly be paid by the pawnor—Pledge must be only for existing debt—Case of pledge for contingent debt—Pledgee bound to produce the pledge on receiving a partial payment—Destruction of the pledge by the pawnor and by a stranger—Interest unlawful—Influence of this rule in retarding development of law of pledge—Qualified power of sale—Must be given by contract itself—Bye-bil-wufa, a comparatively modern innovation—Conflicting opinions of Mahommedan lawyers as to its legality—Opinion of Mahommedan law officer in Bussunt Ally's case—Recognition of validity of Bye-bil-wufas in India—Bye-bil-wufa really a security, not a sale—Gradual recognition of hypothecation—Probable influence of Hindu law—No distinction between pledges of land and pledges of moveables—Moveables, originally the subject of pledge—Gradual extension of pledge of land—Hypothecation—Gradual relaxation of the rule rendering tradition essential.

I WILL now proceed to give a short outline of the Mahommedan law of securities. The Mahommedan law, however, to which I shall ask your attention in this lecture, is not the law which is administered at the present day by our Courts of Justice, but that which is to be found in the authoritative treatises of Mahommedan doctors. Mahommedan law has, no doubt, made great progress since; but in the process, it has lost all its distinctive features, and there can, I apprehend, be no better proof of this than the fact that, according to the law, as administered in Bengal and the North-Western Provinces, at any rate, the respective rights of mortgagor and mortgagee are the same, whether the parties are Hindus or Mahommedans. The process which Mahommedan law underwent in India may be described as one of gradual assimilation to the Hindu law.

Mahommedan law of mortgage.

Gradual assimilation with Hindu law.

LECTURE

II.—
Contd.

Difference
between
Mahom-
medan law
and Hindu
and Eng-
lish law.

There is one feature of Mahommedan law which distinguishes it as well from the Hindu as from the English law.

We saw that, in both the latter systems, the ownership of the property mortgaged is liable to pass to the creditor on the failure of the debtor to repay the loan by the appointed time. The transfer is the result of the agreement of the parties, by which the debtor renounces his right to the pledge upon default. In the Roman law, however, we found that another kind of security was invented at a very early period, by which the possession only was transferred to the creditor. This kind of security, as I told you, had a very great fortune in Roman law. It displaced the older form of mortgage, and the respective rights and duties of the pledgor and pledgee were moulded on principles altogether different from those which have obtained in systems in which a conditional transfer of ownership is the recognized mode of giving security. In the later Roman law, as you know, the ownership never passed to the creditor on the default of the debtor; the mortgagee was only authorized to sell the pledge and satisfy his debt out of the proceeds. Now the pledge of the strict Mahommedan law resembles very closely the *Pignus* of the civil law. The creditor is not permitted to become the owner of the pledge. His right is confined, with certain limitations which I shall presently notice, to the sale of the pledge, when, if there is a surplus, the debtor becomes entitled to it. It is true that the ingenuity of Mahommedan lawyers soon invented another kind of security, analogous to the *Fiducia* of the Roman and the mortgage of the English law. But there cannot be the shadow of a doubt, that the early Mahommedan law did not recognize any other kind of security than the *Rahn*, to which I now propose to address myself.

Analogy
between
Mahomme-
dan law and
Roman law.

Whether
pledge must
be accom-
panied by
possession.

A pledge in Mahommedan law, as signified by its name (*Rahn*), is defined in the *Hedaya* as “the detention of a thing on account of a claim which may be answered by means of that thing, as in the case of debts.” (*Hamilton’s Hedaya*, Vol. IV, p. 189.) There is a good deal of discussion in the Mahommedan books as to the necessity of possession to the validity of a pledge, but the weight of authority seems to be in favour of the position that a pledge is not valid unless it is accompanied by possession. It is said in the *Hedaya* that “until the seizin actually take place, the pawnor is at full liberty either to adhere

to, or recede from, the agreement, as the validity of it rests entirely upon the seizin, without which the end and intention of a pledge cannot be answered." (Hamilton's Hedaya, Vol. IV, p. 190.) In these words you cannot fail to perceive the very same primitive notions which are traceable in early Hindu and Roman jurisprudence. It is also clear that the Mahommedan law had not ceased to be under the dominion of archaic notions when the Hedaya was compiled. The conflicting dicta, however, which are collected by the author, show that the process of emancipation had already commenced, and, it may be presumed, was accelerated in some measure by the Hindu law, with which it came into contact in India.

LECTURE
II.—
Contd.

Conflict-
ing opin-
ions of Ma-
hommedan
lawyers.

Possession being thus essential to the validity of a pledge, it followed as a corollary, that things of which there could be no delivery of possession according to Mahommedan notions, could not be given in pledge. Thus, an undivided share in any property, whether moveable or immoveable, could not be lawfully pledged. One eminent Mahommedan lawyer, indeed, who seems to have entertained more advanced notions on the subject, maintains a contrary opinion; but the weight of authority is opposed to his view. The discussion on this point in the Hedaya discloses a conflict between archaic notions and modern ideas, which is extremely interesting.

Things
incapable
of seizin
cannot be
pledged.

"It is unlawful," says the author of the Hedaya, "to pawn an indefinite part of anything. Shafei maintains that it is lawful. On behalf of our doctors, two reasons are urged: *First*, this disagreement arises from the difference of opinion regarding the object of pledges; for, according to us, pledges are taken to be *detained, with a view to obtain payment of a debt*, which cannot be effected in case the pledge be an undefined part of property; because a seizin of things of that nature cannot be made, a real seizin being only practicable with respect to things which are defined and distinguished—whereas, according to Shafei, the *object of pledges is that the pawnee may sell them to effect a discharge of his debt*; and with this object, pledges of the nature abovementioned are not in any shape inconsistent. *Secondly*, it is an essential part of the contract of pawn, that the pledge be constantly detained in the hands of the pawnee until the redemption of it by the pawnor—a condition which cannot be fulfilled with respect to pledges of the above nature; for, in such cases, it would be necessary that the

Detention
essential to
validity of

LECTURE II.— *Contd.* pawnor and the pawnee have possession of the article alternately, whence it would be the same as if the pawnor were to say to the pawnee, 'I pawn it to you every other day;—as, therefore, a constant detention is in such case impossible, it follows that the pledge of an undefined part of anything, whether capable of division or incapable, is illegal.' (Hamilton's Hedaya, Vol. IV, p. 203.) A way, however, was ultimately found out of the difficulty created by the necessity of detaining the pledge, and the restriction might be evaded, in the later Mahommedan law, by the fiction of the pawnee lending the pledge, which he was at liberty to do, to the pawnor. The pledge, however, might be resumed at any moment by the pawnee, while the loan did not put an end to the pawn. (Hamilton's Hedaya, Vol. IV, p. 244.)

pledge in Mahommedan law.

Pawnee lending the pledge to the pawnor.

Seizin not necessary in the Maliki law.

It is important to observe that, under the Maliki law, seizin is not necessary. Contact with foreign peoples and foreign institutions could not long fail to do their work of disintegration. As truly observed by Mr. Ameer Ali, "the grand superstructure of Islamic jurisprudence is founded on the Koranic laws and the traditional sayings of the prophet, but much of the coping stone was supplied at Bagdad, in Syria, in Andalusia and Persia," and, the learned professor might have added, in India. (Tagore Law Lectures, 1884, p. 4.) But the building, although representing different styles of architecture, is, on the whole, if somewhat wanting in grace and symmetry, not altogether deficient in solidity, nor absolutely inharmonious in its parts.

Anequity of redemption cannot be the subject of a gift.

It seems that an equity of redemption cannot strictly be the subject of a gift in Mahommedan law, because possession being essential to the validity of a pledge, there can be no delivery of seizin to the donee, without which the gift would be incomplete. Thus, in the Fatawa-i-Alamgiri (Vol. III, p. 521), it is said that if the property be in the hands of a pledgee, the gift is not lawful for want of possession. As pointed out by Macnaghten, the reason of the rule is, that seizin and delivery cannot be effected when the thing is not in the possession of the donor. "It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained or claimed as in the case of a pledge or of an usurpation." (Note to Macnaghten's Precedents of Gifts Cases, No. 6, and the opinion of the Mahommedan Law Officer. See also *Mohinudin v. Man-*

shershah, I. L. R., VI Bom., 650.) This rule, however, has fallen into disuse with the reason for it, since hypothecation was engrafted on the older Mahommedan law. If the property, therefore, be not in the possession of the mortgagee, as frequently occurs in practice at the present day, the objection does not apply and a valid gift or dedication, in which also delivery of possession is essential, may be made by the mortgagor, of his equity of redemption. (*Shahzadee Hazra Begum v. Khaja Hussain Ali Khan*, XII Suth. W. R., 498; IV Ben. L. Rep., A. C. J., 86.) As I have already observed, this restriction never applied to a sale of the equity of redemption in which seizin is not essential, although there is a very peculiar rule in the Mahommedan law relating to priority in the case of two successive sales by the mortgagor of his property.

LECTURE
II.—
Contd.

It may, however, be doubted whether the view that a gift of the equity of redemption is invalid is not founded upon a narrow construction of the Hanafi law. It is clear that in the case of a *howalat* the debt may be transferred from the original debtor to a third person, and if such debt happens to be secured by a pledge, the person who discharges the debt would seem to be entitled to the pledge. The passage in the *Fatawa Alamgiri*, to which I have already referred and which is generally cited as an authority for the proposition that the gift of an equity of redemption is unlawful, may perhaps be read not as absolutely prohibiting a donation, but only as negating the right of the donee to actual possession in derogation of the rights of the mortgagee under his mortgage. (See the observations of Mr. Ameer Ali in the *Tagore Law Lectures*, 1884, pp. 69—70, where the learned author points out the analogy between a gift of a reversion and one of an equity of redemption.)

The Hanafi
law.

I shall now proceed to consider the respective rights of the pledgor and pledgee in Mahommedan law. I propose to place before you only a rough outline, as the details cannot be said to possess much interest. The pledgee had the right to sell the pledge on the default of the debtor, but only when the right was given by the contract itself. He was then regarded as the agent of the debtor, but the authority, upon principles recognized in every system of law, was not revocable. It was not necessary that the authority should be given to the creditor himself. It might, at the option of the party, be given to a third

Rights of
the pledgee.

Power of
sale in Ma-
hommedan
law.

LECTURE II.—
Contd.

Rights of
pledgor.

person who could be compelled by the Court to exercise the power. A sale, however, by actual judicial process, seems to have been unknown, and the Kazi could only compel a person who had been invested with the power of sale to exercise it for the benefit of the creditor. If the power of sale was not given by the original contract, the pledgee had only a bare lien, without the right of getting material satisfaction out of the pledge. In the Mahommedan law, the debtor was not authorized to deal in any way with the property pledged by him; and a sale without the consent of the creditor was invalid. If, notwithstanding, the debtor sold the property to two persons in succession, the person who was recognized as the purchaser by the pledgee, acquired a preferable right to the property, although the sale to him might be posterior in point of time.

Consequences of
loss of
pledge.

The rule of the Mahommedan law regarding the liability of the pledgee for the destruction of the pledge even when the destruction is accidental, is somewhat peculiar. It is thus stated by Macnaghten: "Where such property, being equivalent to the debt, may have been destroyed otherwise than by the act of the pawnee or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee or mortgagee is not responsible for the excess; but where it falls short of the debt, the deficiency must be made up by the pawnor or mortgagor: but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt." (Macnaghten's Mahommedan Law, Chap. XI, § 19.)

Liability of
expenses
connected
with the
custody
and pre-
servation
of pledge.

There are one or two other points which deserve notice. The pledgee was not permitted to enjoy the usufruct of the property pledged to him, but he was not chargeable with the expense of providing for the support of the pledge, although he was bound to provide for its custody. "It is to be observed," says the author of the Hedaya, "that the wants of a pledge are of two kinds: (1) such as are requisite towards the support of the pledge and the continuance of its existence; (2) such as may be necessary towards its preservation or safety, whether wholly or partly. Now, as the absolute property of the pledge appertains to the pawnor, the expenses of the first class must, therefore, be defrayed by him; and as he has, moreover, a property in the usufruct of the pledge, its support and the

continuance of its existence, for this reason also, rest upon him, being an expense attendant upon his property,—in the same manner as holds in the case of a trust. Of this class, are the maintenance of a pledge in meat and drink, including wages to shepherds, and so forth; and the clothing of a slave, the wages of a nurse for the child of a pledge, the watering of a garden, the grafting of fig trees, the collecting of fruits, &c. The expenses of the second class, on the contrary, are incumbent on the pawnee; because it is his part to detain the pledge; and, as the preservation of it, therefore, rests upon him, he is consequently to defray the expense of such preservation. Of the second class is the hire of the keeper of the pledge; and so likewise the rent of the house, wherein the pledge is deposited, whether the debt exceed or fall short of the value of the pledge." (Hamilton's Hedaya, Vol. IV, pp. 200-201.) But any taxes or tithes, due on account of the pledged property, must be paid by the pledgor as payments necessary towards the subsistence of the property. (Hamilton's Hedaya, Vol. IV, p. 202.)

LECTURE
II.—
Contd.

A pledge cannot be given as a security against contingencies. Thus, a pledge deposited with a person, as a security for anything which may be due in future, is invalid; "although," adds the Hedaya, "it is otherwise in the case of a promised debt, as, where a person gives a pledge to another on the strength of his promising to lend him one thousand dirhems, and the other takes the pledge and promises to lend the money, and the pledge perishes in his hands; for, in this case, he is responsible in proportion to the sum promised, in the same manner as if it had been actually paid, the promise of debt being considered as an actual existence of it, for this reason that it was made at the earnest desire of the borrower." (Hamilton's Hedaya, Vol. IV, pp. 208-209.) In a case, in which a Mahomedan vendor had deposited with the vendee the title-deeds of a certain estate, as a security for his delivering up to the vendee the title-deeds of the property which had been sold to him, and which were not at the time in the possession of the vendor, Lord Kingsdown observed: "By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one, not of pawn, but of trust." (*Varden Seth Sam v. Lukputty Royjee Lulla*, IX Moore. Ind. App., 320.)

Pledge must be only for an existing debt.

LECTURE

II.—

Contd.

Pledges
bound to
produce
the pledge
on receiv-
ing a partial
payment.

Destruc-
tion of the
pledge.

Increase
accruing
from the
pledge.

Causes of
slow deve-
lopment of
Mahomme-
dan law.

It seems that in the Mahommedan law a pledgee is bound to produce the pledge, as well on receiving a partial payment, as in the case of a complete discharge, because, as the doctors say, the pledgee's producing the pawn is of no prejudice to him, while, at the same time, it serves to dissipate any apprehension of the loss of the pledge which may have arisen in the mind of the pawner. (Hamilton's Hedaya, Vol. IV, p. 196.)

If a pawner destroy the thing he has pledged, the pawnee may demand a fresh pledge; but if a stranger (that is, a person unconcerned in the contract) destroy the pledge, the pawnee (not the pawner) is litigant against him, and may take from him a compensation for the value, which he must retain in pawn in place of the original pledge; for the pawnee, as being the most entitled to the substance of the pledge, is also most entitled to its substitute, namely, the value. (Hamilton's Hedaya, Vol. IV, p. 243.)

It is important to observe that every species of increase accruing from a pledge after the execution of the contract (such as milk, fruits, wool, or progeny), belongs to the pawner as being an accession to his property,—but they are, nevertheless, detained with the original in pawn; for “branches are dependant on the stock; and the contract of pawn, being of a binding nature, extends over all its branches.” (Hamilton's Hedaya, Vol. IV, p. 263.)

We have seen that the pledgee did not possess, in the Mahommedan law, an unqualified power of sale; and the reason why no improvement took place in this respect is not far to seek. The Mahommedan law prohibited the taking of interest as unlawful, and this rule must have seriously retarded the development of the law of pledge. We saw how common fairness suggested in Hindu law the rule by which the debtor was bound to redeem before the interest became equal to the principal. But no such liability was imposed upon the Mahommedan debtor, because the pledge was thought to be a sufficient security for the loan, and, as the debt could not receive any accession, the creditor did not run any serious risk of losing his money. The prohibition, however, relating to interest, led to the invention of the *bye-bil-wufa*,—a kind of security, analogous to the English mortgage, and possessing a very interesting history.

The Mahommedan creditor, being prohibited by law from taking interest, devised a mode of evading this restriction

under color of a sale with a clause for re-purchase. Such a condition was perhaps strictly legal; but Mahommedan lawyers were slow to recognise a transaction which wore only the semblance of a sale, but was, in reality, a loan repayable with interest. The lender, by stipulating for a higher price on the re-sale, or, by receiving the rents and profits, substantially derived the same advantage, as if the money had been placed at interest, while the transaction in form did not violate the law. (*Per* Turner, C. J., in *Rama Sami Sastrigal v. Samiyappanayakan*, I. L. R., IV Mad., 179.) You will find the conflicting opinions of some of the most eminent Mahommedan lawyers on the point collected in Baillie's Treatise on Sales. (See Baillie on the Mahommedan Law of Sale, pp. 301-302.) These conflicting dicta reveal the same conflict between archaic conceptions consecrated by religious sanction and modern economical ideas, that took place in mediæval Europe. The struggle was long and arduous, but the issue could not have been dubious for a moment. The prejudice against usury, although clothed with the terrors of religion, gradually gave way among Mahommedans, as it did among the followers of other creeds, to the practical necessities of society and the teachings of political economy, long before they were either perceived with clearness or formulated with precision.

LECTURE
II.—
Contd.
Origin of
bye-bil-
wufa.

"It is to be observed," says the author of the Hedaya, "that some consider a wufa sale to be invalid, in the same manner as a *compelled* sale, and apply to it the rules of sale by compulsion; whence (according to them) if the purchaser in a wufa sale, sell the article purchased, the sale so made by him may be broken through, as the invalidity of the sale, in this case, is on account of the non-consent of the seller, in the same manner as in a case of compulsion. Wufa sale is where the seller says to the purchaser: "I sell you this article, in lieu of the debt I owe you, in this way, that upon my paying the debt, the article is mine." Some determine this to be, in fact, a contract of pawn, for between it and pawn there is no manner of difference, as, although the parties denominate it a sale, still the intention is in effect a pawn. Now, in all acts, regard is paid to the spirit and intention; and the spirit and intention of pawn exist in this instance—whence it is, that the seller is at liberty to resume the article from the purchaser upon paying his debt to him

Validity of
a wufasale.

LECTURE II.—
Contd.

Some, again, consider a wufa sale to be utterly null, as the purchaser, in the case in question, resembles a person in jest, since he (like a jester) repeats the words of sale, at the time that the effect and purpose for sale are not within his design. Such sale is, therefore, utterly null and void, in the same manner as a sale made in jest. The Hanafite doctors of Samarcand, on the other hand, hold a wufa sale to be both valid and useful, as it is a species of sale commonly practised from necessity and convenience, and is attended with advantage in regard to some effects of sale, such as the use of the article, although the purchaser cannot lawfully dispose of it." (Hamilton's Hedaya, Vol. III, pp. 455-56) (a).

The question of the validity of bye-bil-wufas seems to have been raised in a very early case in the Sudder Dewany Adawlut, when the Mahommedan Law-officers, who were consulted, gave the following opinion: "In the deed, there is first stipulated an absolute sale; afterwards, at the end of it, it is additionally stipulated, that, if the seller shall repay the purchase-money within a year, the sale shall become void. The author of the Buhr-i-rayik says such a condition is illegal, except it be for three days only, according to Hanifa and Abu Yusuf; but, according to Mohammed, it is legal, without restriction, as a *sherti-khiar*, or optional condition." (*Meer Aleem Ullah v. Alif Khan*, I. Macnaghten's Sel. Rep., 73; cf. p. 76.) In a note to the case in which the above opinion was given, Mr. Macnaghten adds: "In the cause '*Busunt Ali v. Ram Coomar*,' decided by the Sudder Dewany Adawlut, on the 4th of January 1799, there was a question put to the law-officers respecting the legality of bye-bil-wufa sales (b), though the cause, as it happened, went off on a question as to the competency of the agent who made the bye-bil-wufa sale in that instance on the part of another. It was stated in the futwa then given, that a sale, with optional condition for three days, is good; but for more than three days is not good, according to Hanifa and Yusuf; but according to Mahommed,

Futwa, or opinion, delivered by Mahommedan law-officers.

(a) "The bye-bil-wufa is called in the Hedaya, Moontad, which means practised or accustomed, viz., in Samarcand and neighbourhood as explained in the Kifayah, Vol. III, page 820." (Baillie's Mahommedan Law of Sale, p. 303, note.)

(b) Wufa means the performance of a promise; and bye-bil-wufa is a sale with a promise to be performed.

for four days, or even a longer period, is good: that the sort of sale being prevalent in the country, Mohammed's opinion should be followed. The intention of the parties, as collected from the tenor of the deed, shows whether the bye-bil-wufa be a sale with the reserve of an option of retraction within a limited time, or a mortgage for the security of money lent. A stipulation for a short period must be considered to mark that a sale was in the contemplation of the parties; a long term denotes a mortgage, or security for a loan: and such mortgages, in the form of conditional sales, are very common, and rightly held valid under the opinion here cited." (I. Macnaghten's Sel. Rep., 77.)

LECTURE
II.—
Contd.

The bye-bil-wufa is, however, regarded only in the light of a security, when any question arises as to its real character, and the debtor is regarded as the owner, notwithstanding the sale with a condition. Mr. Baillie refers to a case mentioned in the futwa of Abul Fazal, in which a person was allowed to assert a right of pre-emption, notwithstanding that the ownership of the property, upon the foundation of which the right was claimed, had been transferred to another by a bye-bil-wufa. (Baillie's Mahommedan Law of Sale, p. 303.) This is no doubt a sensible view of the question, although it is extremely open to doubt whether bye-bil-wufas would have obtained any recognition in the Mahommedan law, if the transaction had not originally masked itself as a sale with a clause of re-purchase.

Bye-bil-wufa, not a sale but a security.

I have now brought down the history of bye-bil-wufas down to a comparatively recent period. As you have already heard, the law relating to Rahn was also considerably modified in time, and hypothecation seems to have been common enough among the Mahommedans in this country, when the earlier Regulations on mortgages were enacted. It would seem that, by that time, the Hindu and Mahommedan law had been welded together, and the result was a mixed system, which has since been brought to the shape in which we find it, by the infusion of some of the doctrines of the English Court of Chancery.

In concluding this account of what I may call the early and mediæval Hindu and Mahommedan law of pledge, I wish to call your attention to the fact, that neither of the two systems recognises any substantial distinction

No distinction between pledge of moveables

LECTURE between a pledge of moveables and a pledge of land. A
II.— glance at some of the rules which we find in both these sys-
Contd. tems will show that moveables alone were originally the
 and im- subjects of pledge,—indeed, in the political and economic
 moveables. condition of ancient society, it could hardly have been other-
 wise. Land was of comparatively little value, while its
 alienation was watched with that excessive jealousy which
 forms such a striking feature in all systems of ancient law.
 Tradition The necessity of transferring the possession of the pledge to
 gradually the creditor must also have proved a serious obstacle to land
 falls into being given as a security. I speak with reserve, but the
 disuse. conjecture is plausible, that as land gradually increased in
 value, the rigor of the ancient rule was insensibly relaxed.
 The relaxation was probably, at first confined only to
 immoveable property, till, in course of time, it was extend-
 ed to moveables. It is thus that in the Eastern, as
 well as in the Western world, the “substantial pledge”
 becomes ultimately “refined into the invisible rights
 of the hypotheca.”

LECTURE III.

Different kinds of mortgage — Three principal kinds of conventional mortgages — Simple mortgage — Mortgage by conditional sale — Usufructuary mortgage — Local mortgages — Mortgage how created — Writing not essential — Oral agreements valid in Hindu and Mohammedan law — Parol mortgages invalid in English law, but valid here, though the effect of the Indian Registration Act is to give preference to registered instruments — Two aspects of a mortgage — Debt secured by mortgage on a bond how to be sold in execution — Mortgagee's interest, under English law, merely that of a security — Specific performance of a mortgage not always allowed — Conflict of laws — Mortgage of immoveable property governed by the *lex rei sitæ* — This rule not recognised by the French Code — Parol mortgage accompanied by possession protected by the Registration Act, but constructive possession not sufficient — Admissibility of parol evidence discussed — *Kassinath Chatterjee v. Chundy Churn Banerjee* — For qualifying the terms of a written instrument, parol evidence inadmissible — Parol evidence of "agreement," and of "acts" and "conduct" — No real distinction between the two — Provisions of the Evidence Act on the point — Authorities for and against the admissibility of parol evidence of "acts" and "conduct" — Parol defeasances ought to be held inadmissible — Parol evidence when admissible in case of fraud or mistake — Justice Melvill's judgment — True rule on the point formulated in the Specific Relief Act — History of English law on the point — *Taltaram's Case* — Judges usurping the functions of the legislature and relaxing the Statute of Frauds — Two kinds of consensual mortgages, express and implied — Mortgage by deposit of title-deeds — Equitable mortgage in English law, as opposed to a legal mortgage — Equitable mortgage in the *mofussil* — Equitable mortgagee has only a decree for sale in the *mofussil*, but may foreclose in the original jurisdiction of the High Court — Mortgage implied by delivery of the title-deeds, and, if further accompanied by an agreement, to create a charge: the transaction is an express conventional mortgage — *Varden Seth Sam's Case* — Growth of equitable mortgage in England — Memorandums, true nature of — Mortgage of the equity of redemption is an equitable mortgage — Registration — Equitable mortgage in England, how created — Mortgage of future crops — What cannot be the subject of mortgage — The expression "equitable mortgage" not properly applicable to a transaction between natives of this country — Defence of purchase for value without notice — Equitable defence not available here — In case of wilful neglect or fraud, such defence available — *Durga Prasad, v. Shumbu Nath* — Memorandum not the contract between the parties, but simply an evidence of the deposit of the title-deeds — *Kedernath Dutt, v. Sham Lall Khetry* — Bombay cases on the point — Summary of decisions — Registration of memorandum not necessary — Equitable mortgage not an oral agreement within the meaning of the Registration Act — Proper subjects of mortgage — General hypothecation invalid — Accidental destruction of object of pledge — Capacity to mortgage — Rights of a trustee with limited powers — Persons under disability incapable of creating a mortgage — Case of a minor — Rights of guardian — Accessions to pledge — Mortgagee's right to the accessions only a qualified right — Leading case on the point, *Rajah Kishendatt v. Raja Mumtaz Ali* — Mortgagor having defective title bound to make good mortgage out of property subsequently acquired — Right of the mortgagee, being in the nature of a right to claim specific performance, plea of purchase for value without notice is a good defence — Frauds by the mortgagor and mortgagee — Doctrine of estoppel — Right of the mortgagee does not extend to things not pledged to him — Rights of mortgagor and

LECTURE
III.

mortgagee when pledge assumes a new form—*Bajnaath Lal v. Ramdin Chowdry*—Mortgagee not a party to a suit for partition of mortgaged joint family property—Mortgage of joint estate in Roman law—Mortgagee not estopped by a previous judgment—*Bonomally Nag's Case*—Question of estoppel discussed in *Siluram v. Amir Begum*—*Res judicata*—Mortgagee when bound by the acts of the mortgagor—Rights of the mortgagee—Mortgagee entitled to detain title-deeds, and mortgagor to inspect them at all reasonable times—Liability of the mortgagee of a lease-hold for rent—Mortgage of a whole term in English law—Power of sale in mofussil mortgages—Validity of power of sale discussed—*Bhowani Churn Mitter's Case*—Power of sale not allowed in the French Code.

Different kinds of mortgage.

Three principal kinds of mortgages.

In the present course of lectures, I shall adhere to the classification of securities which we found in the Roman law. Following that classification, I purpose in this lecture to make a few general observations upon the various kinds of conventional or contractual mortgages in use in India at the present day. From what I have already said, you must have seen that a creditor possessing a security may have, either a right to sell the property mortgaged to him, or, he may become the absolute owner of the property, on the default of the mortgagor to repay the money lent to him. In the first case, the creditor is not entitled to anything in excess of the debt and costs. In the second case, the creditor becomes entitled to the property, whatever may be its value. In either case, however, the creditor is wholly independent of the debtor. But, there is another mode in which property may be given as a security, and that is by letting the creditor into possession, and permitting him to repay himself out of the rents and profits. Thus, we have three different kinds of securities, all of which are to be found in India. The first is called a simple mortgage; the second, a conditional sale; and the third, an usufructuary mortgage. It is true, they may be sometimes found in combination, thus giving rise to a greater variety; but, the three I have just mentioned are, what I may call, the primary divisions of Indian mortgages (a). I shall discuss hereafter the various rights and liabilities created by each of these three kinds of mortgages, and will now only state the different modes in which conventional or contractual mortgages may be created, and the formalities which it is necessary to observe, ending with a few general observations on this class of securities.

Oral agreements valid

We must remember that neither the Hindu nor the Mahomedan law requires writing for the validity of any

(a) In addition to the above there are various kinds of local mortgages prevailing in different parts of the country. For a short account of these mortgages, see Appendix I.

transaction, however solemn. "Contracts of every description, involving both temporal and spiritual consequences, may be made orally." (Per Holloway, J., in *Srinivasammal v. Vijayammal*, II Mad. H. C. Rep., 37.) It is true that writing is often enjoined, particularly by Hindu lawyers, and preference, as we have seen, is sometimes given to a transaction evidenced by writing over a parol contract or transfer. But the fact remains that in no instance is writing absolutely necessary by law (*b*). Among Englishmen, however, who can only convey by deed, a parol mortgage is invalid at law. We shall, however, presently see that the strict rule of law has been relaxed in favour of a class of securities, known as equitable mortgages in the English law because they are only recognised by the Court of Chancery. Among Hindus and Mahomedans, however, a parol mortgage is just as good as a mortgage reduced to writing. This rule of Hindu and Mahomedan law has been left untouched by the legislature, notwithstanding the introduction of a very stringent system of registration (*c*). In practice, however, mortgages are almost invariably reduced to writing; and the language of the earlier Regulations shows that the practice is by no means of recent growth. In conditional sales, however, parol defeasances are not uncommon, although in recent years, they have become much less frequent than before. But it must not be understood, that a verbal mortgage stands in all respects in the same favourable situation as a written mortgage which has been registered. The Indian Registration Acts, although they do not insist upon the necessity of a written instrument, when the laws of the country do not require that the transaction should be evidenced by writing, give, as a rule, preference to registered instruments over mere parol agreements or declarations. Section 48 of the present Registration Act says: "All non-testamentary documents duly registered under this Act, and relating to any property whether moveable or

LECTURE
III.in Hindu
and Ma-
hommedan
law.Parol mort-
gage even
now valid.Preference
to register-
ed instru-
ments.Indian Re-
gistration
Act.

(*b*) If, however, a mortgage is reduced to writing, any material alteration in the instrument without the consent of the party affected by such alteration, will render the document void—*Mohesh Chunder Chatterjee v. Kamini Kumari Debi*, I. L. R., XII Cal., 313; I. L. R., X Bom., 487; I. L. R., IX Mad., 399. As to what constitutes material alteration, see I. L. R., XII Cal., 313. and the cases cited therein; but see I. L. R., VII Bom., 418.

(*c*) But see the provisions of the Transfer of Property Act, which came into operation on the 1st July 1882; the Act, however, does not extend to the whole of the country.

LECTURE III. — immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession."

Meaning of "agreement." The section is not very happily worded, and the meaning of the words "agreement" and "declaration," which have been reproduced from the older Acts, has given rise to some discussion. There can be no doubt, however, as explained by Mr. Justice Markby in *Salim Sheik v. Bydanath Ghuttuk*, that the word "agreement" in the Act is not intended to be used merely in the sense of what English lawyers call an executory agreement, but that it embraces conveyances as well as contracts. (XII *Suth. W. R.*, 217. See *Holland's Jurisprudence*, p. 209, where the ambiguity lurking in the term agreement in the English law is clearly pointed out.)

Two aspects of a mortgage.

In connection with the subject of registration, it is important to observe that a mortgage may be viewed in two different aspects. It is a contract creating a personal right, in so far as the promise of the debtor to repay the loan is concerned. But it is also a conveyance, in so far as it passes to the creditor a real right in the property, which is charged with the repayment of the money. Now, a real right, as I have already explained to you, is never conferred by a mere contract; but a mortgage is looked upon so much as a mere contract that it is precisely one of those transactions in which we are most likely to confound a contract with a conveyance. I shall show hereafter the importance of this distinction which seems to have been overlooked in some of the cases in the books, and in which a hypothecation has been regarded merely in the light of a right *in personam*.

Sale of a debt secured by a mortgage-bond.

In some cases, however, the Court seems to have gone to the opposite extreme. It has been held, for instance, that a debt which is secured by a mortgage on a bond, cannot be sold under our Code of Civil Procedure according to the rules regulating the sale of moveable property. Section 266 of the Code does, indeed, speak of bonds and other securities for money, but the Court still seems to have thought that the case of a mortgage-debt is not expressly provided for by the Civil Procedure Code, and, that, as a mortgage is not merely a debt, but represents a substantial interest in the mortgaged property, that is the right of selling it under certain conditions for realisation of the debt, the latter cannot be sold apart from the security, and that, in such cases, there should be an

attachment under section 274 as well as under section 266 of the Civil Procedure Code, a rather complex proceeding, which could scarcely have been in the contemplation of the Legislature. I should have thought that, as in other systems of law, a sale of the debt would necessarily carry with it as an incident the lien of the judgment-debtor, and that section 266 of the Code of Civil Procedure was wide enough to include a debt secured by a mortgage. (*Debendro Kumar Mandel v. Ruplall Das*, I. L. R., XII Calc., 546. But see *Srinath Dutt v. Gopal Chunder Mittra*, I. L. R., IX. Calc., 511; *Bhawani Kumar v. Gulab Rai*, I. L. R., I, All., 348; and *Appasami v. Scott*, I. L. R., IX. Mad., 5 I. L. R., X Mad., 169.)

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III.

It may, perhaps, be useful to mention here that in England, whatever may be the form of the mortgage, it is for all practical purposes regarded as personal property. Thus on the death of the mortgagee, the security, whether the mortgage is of a freehold estate or not, becomes vested in his personal representatives. But if the mortgage is foreclosed during the lifetime of the mortgagee so as to be converted into real estate, it goes to the heir-at-law, although in a case where the mortgage becomes irredeemable for the first time in the hands of the latter by foreclosure or otherwise, he will be regarded only as a trustee for the executor. (*Williams on Executors*, pp. 693-4. But see *Sham Narain Singh v. Raghubar Dyal*, I. Cal. L. Rep. 343; I. L. R., III. Calc., 508.)

Mortgagees' interest in English law merely that of a security.

But, although a mortgage creates an interest *in rem*, a mere agreement to borrow or to lend a sum of money on mortgage, will not be specifically enforced. (*Rogers v. Challis*, 29 L. J. Ch., 240; 27 Beav., 175; *Anakaran Kasim v. Saidamadath Avulla*, I. L. R., II Mad., 79.) If a person, however, agrees to execute a mortgage in consideration of money actually due by him, he may be compelled to perform his agreement. (*Ashton v. Corrigan*, 13 L. R., Eq., 76; 41 L. J. Ch., 96; see also *Hermann v. Hodges*, 16 L. R., Eq., 18; 43 L. J. Ch., 192; 21. W. R., 571.) A doubt has, indeed, been expressed in some cases whether a mere agreement to give a mortgage for a past debt unaccompanied by any express stipulation for forbearance can be enforced, but the doubt rests upon considerations wholly foreign to the present topic, and need not, therefore, be discussed in this place. (See *Crofts v. Fenge* 4 Ir. Ch. Rep. 316; *Woodroffe v. Johnston* 4, Ir. Ch. Rep. 319.)

Specific performance of a mortgage.

LECTURE III. The peculiar nature of a mortgage transaction operating, as it does *in rem*, has also given rise to some discussion in connection with the subject of conflict of laws. It is, perhaps, not very easy to extract a clear and consistent rule from the mass of controversial writing in which the question has got entangled, but the better opinion seems to be, that the validity of the transaction, in so far as it affects immoveable property, will be governed by the *lex rei sitæ*, and the fact that both the parties are domiciled in a foreign country, will not make any difference. It seems that the formalities of the contract will also be regulated by the same law. A distinction has, indeed, been suggested between a contract and a conveyance between an agreement to mortgage for instance, and a perfected mortgage; but the weight of authority is not in favour of such niceties. And a mortgage not executed in conformity with the law of the country in which the land is situated, would not, therefore, create any obligation to execute a formal mortgage according to the *lex rei sitæ*, although a different view has been advanced by some eminent lawyers (*d*). (Story's Conflict of Laws, pp. 610—611, and the authorities cited therein.)

Conflict of laws.

Difficulties have also been sometimes felt in determining the forum in which mortgages should be enforced, as also in ascertaining the law of prescription which should regulate the right of a mortgagee to enforce his security; but I reserve these questions for discussion in the next lecture.

Registration when necessary.

As a mortgage creates an interest in land it must, where the debt secured by the mortgage is not less than 100 rupees, be registered (*e*). The provisions of the Indian Registration Act are very stringent, but it must be remembered that, for the purposes of registration, the principal alone is taken into account. Again, in the case of an assignment of a mortgage, the necessity of registering the deed of transfer depends, not upon the amount due on the mortgage, but

(*d*) The provisions of the French Code are, however, less liberal. Art. 2128 of that Code provides that "contracts made in a foreign country cannot give a mortgage upon property in France, unless there be stipulation contrary to this principle in the political laws, or in treaties."

(*e*) A charge of debts may be created by will, in which case registration is not necessary. As to what constitutes a charge of debts, see I. L. R., VII Calc., 772; and the English cases cited therein. Cf. I. L. R., IV Calc., 402; distinguish I. L. R., IX Calc., 406.

upon the amount for which the assignment is made. It seems that if the assignment is unregistered, the debt will be transferred, but not the lien. (*Koob Lall Chowdhry v. Nitya Nund Sing*, I. L. R., IX Calc., 839; *Ganpat Pandurang, v. Adarji Dadabhai*, I. L. R., III Bom., 312). But the question whether the assignment of the debt does not carry with it the lien of the creditor by operation of law, was not distinctly raised in these cases. If the lien is transferred by operation of law, the assignee may fairly claim to avail himself of the security, notwithstanding the inadmissibility in evidence of the deed of assignment. (*Surwan Hossein v. Golam Mahomed*, IX. Suth. W. R., 170, F. B.; *Nadir Hossein v. Pearoo Thovildarinee* XIX Suth. W. R., 254). In this connection it may be mentioned, that the words, "any right, title, or interest, whether vested, or contingent to, or, in, immoveable property," may sometimes give rise to questions of considerable nicety where the interest created by the document is only an indirect one. Similar questions occasionally arise in England upon the Mortmain Act, which makes void all gifts of any interest in lands in favour of charities. It has been held in a recent case by the English Courts that a mortgage by persons of their interests under a settlement, the funds subject to which are invested on mortgage of land, confers an interest in land, and, cannot, therefore, be bequeathed to a charity. (*In re Watts. Cornford v. Elliot*, 27 Ch. D., 318; S.C., on appeal, 29 Ch.D., 947.) It does not, however, necessarily follow that a similar construction will be placed on the provisions of the Indian Registration Act (f).

Before dismissing the subject of registration, I wish to make one observation. We find that a parol mortgage is protected, only when it is followed, or accompanied, by possession; and the reason is, that the actual delivery of possession gives publicity to the transaction, and thus lessens the chances of fraud. It is upon this principle, that the Court has refused to extend the protection to a case in which a merely constructive possession is delivered to a person already in actual possession, either as tenant or under some other title. (*Kirtee Chunder Haldar v. Raj Chunder Haldar*, XXII. Suth W. R., 273. See also *Fury v. Smith*, 1 Huds. and Bro., 735, a case under the Irish Registration Act. But see *Palani v. Selambara*,

LECTURE
III.

Parol mortgage when accompanied by possession.

Constructive possession not sufficient under the Registration Act.

(f) See on the subject of registration generally, Appendix III, Statutes,—tit. Registration

LECTURE III. J. L. R. IX. Mad. 267.) The English Acts, I may mention, exempt leases only where *actual* possession and occupation go with the lease.

Admissibility of parol evidence discussed.

I have already alluded to the practice which obtains in this country for the borrower, in the case of a mortgage by conditional sale, to convey the estate absolutely to the lender; the latter agreeing, by a contemporaneous agreement which is sometimes verbal, that he will re-convey the estate to the borrower on repayment of the loan. The question, whether such parol agreement could be received in evidence to control the terms of a document which was on its face a deed of absolute sale, was raised in the Calcutta High Court in the case of *Kassinath Chatterjee v. Chundy Churn Banerjee* (V. Suth W. R., 68, F. B.), and was referred to a Full Bench, when a majority of the Judges returned an answer in the negative.

Kassinath Chatterjee v. Chundy Churn Banerjee.

It is perhaps necessary to observe that the law laid down by the Court in *Kassinath Chatterjee v. Chundy Churn Banerjee*, does not in any way trench upon any rule of Hindu or Mahomedan law, neither of which, as I have already said, refuses to give effect to parol agreements.

Exclusion of parol evidence.

"Admitting that the law allows sale of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses, and was intended to express. If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot, by mere verbal evidence, show, that, at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage." (Per Peacock, C. J., in *Kassinath Chatterjee v. Chundy Churn Banerjee*, V. Suth. W. R., 68, F. B.) The exclusion of parol evidence for the purpose of qualifying the terms of a written instrument, rests upon the presumption that when parties choose to reduce the terms of a contract to writing, they intend to insert the whole of the terms. A different rule would open the widest door to fraud and perjury.

A distinction, however, is taken by the Court between parol evidence of an agreement and evidence of the "acts" and "conduct" of the parties, the Chief Justice being of opinion that parol evidence is admissible to explain the acts of the parties, as for instance, that the document purporting to be a conveyance was not accompanied or followed by possession. It is, however, not quite easy to discover the ground upon which the distinction is made, a distinction which, as pointed out by a learned Judge, is hardly reconcilable with the principle upon which the exclusion of parol evidence is founded.

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III.

Parol evidence of acts and conduct.

In the case of *Madhub Chunder Roy v. Gungadhur Shamuntho* (XI. Suth. W. R. 450; III Ben. L. Rep., 83 A. C.) Mr. Justice Markby is reported to have said: "It seems to me to be very difficult to understand the distinction drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the acts of parties contradicting the terms of such a contract being admissible. In all these cases, one starts with the proposition that there was a written instrument which unequivocally and unmistakably declares the intention of the parties, and I should have thought that it was quite as objectionable, if not more so, to contradict the plain terms of the contract, by what are called "acts" by the Full Bench, *which can only lead to an inference*, than to contradict them by an express and unequivocal and unmistakeable parol arrangement between the parties. I should have thought that the principle was this, that when we have once got a clear expression in writing of that which professes to be the intention of the parties, that must conclusively be taken to be the relation which was intended to be created between them, and that to get at their intention, no other evidence, whether of contemporaneous acts or agreements, ought to be admitted."

Madhub Chunder Roy v. Gungadhur. Shamuntho.

Since the above observations were made, the Legislature has passed the Indian Evidence Act, section 92, of which says: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives

Provision of the Evidence Act on the point.

LECTURE in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.”

III.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Authorities for, and against, the admissibility of parol evidence.

The language of the section is not wholly free from ambiguity, and has given rise to a number of conflicting decisions; there being authorities both for, and against, the reception of parol evidence of the acts and conduct of the parties. (For cases in which oral evidence was admitted, see *Kassinath Chatterjee v. Chundy Churn Banerjee*, V Suth. W. R., 68; Ben. L. Rep., Sup. Vol., 383; *Ram Dyal Kooer v. Bishen Dyal Singh*, VIII Suth. W. R., 339; *Pheloo Monee v. Greesh Chunder Bhattacharjee*, VIII Suth. W. R., 515; *Nundolall Mitter v. Prosunno*

Moyee, XIX Suth. W. R., 333; *Ram Doolal Sen v. Radhanath Sen*, XXIII Suth. W. R., 167; *Muttyloll Seal v. Anundo Chunder Sandle*, V Moore Ind. App., 72 (explained, however, in *Kasheenath Chatterjee v. Chandy Churn Banerjee*, V Suth. W. R., 68, and *Banapa v. Sundardas*, I. L. R., I Bom., 333); *Buksu Lakshman v. Govinda Kauji*, I. L. R., IV Bom., 594; *Hasha Khand v. Jesha Premaji*, I. L. R., IV Bom., 609 (foot note); *Govinda v. Jesha Premaji*, I. L. R., VII Bom., 73; *Cutts v. Brown*, I. L. R., VI Calc., 328; S. C., VII Cal. L. Rep., 171; *Kashinath Dass v. Hurrihur Mookerjee*, I. L. R., IX Calc., 898; *Hem Chunder Soor v. Kally Churn Das*, I. L. R., IX Calc., 528; S. C., XII. Cal. L. Rep., 287 (g); *Parbadi Sahani v. Mohamed Hossein*, I Ben. L. Rep., 37, A. C.; *Maxwell v. Mountacute*, Pre. Ch., 526; *Walker v. Walker*, II Atk., 99; *Dixon v. Parker*, II Ves., 225; *Young v. Peachy*, II Atk., 257; *Joynes v. Stratham*, III Atk., 388; *Francklyn v. Ferne*, Barn. Ch., 30; *Cotterell v. Purchase*, Ca. t. Talbot, 61; *Spurgeon v. Cottier*, I Eden., 55; *Holmes v. Mathews*, IX Moore P. C. C., 413; *Barnhart v. Greenshield*, IX Moore P. C. C., 18; *Langton v. Horton*, V Beav., 9; *Douglas v. Culverwell*, III Giff., 251. In the following cases, oral evidence was rejected: *Madhub Chunder Ray v. Gungadhur Shamuntho*, XI Suth. W. R., 451; S. C., III Ben. L. Rep., 83 A. C.; *Banapa v. Sundardus Jagjivandas*, I. L. R., I Bom., 333, and the cases cited therein; *Ram Doyal Bappie v. Heera Lall Paray*, III Cal. L. Rep., 386; *Daimoddee Paik v. Kaim Turidar*, I. L. R., V Calc., 300; S. C., III. Cal. L. Rep., 419.)

In support of the exclusion of parol evidence, it has been said that the acts and conduct of the parties would, at the best, furnish evidence of an unwritten or oral agreement, and that if direct evidence of an oral agreement is inadmissible, *à fortiori*, indirect evidence of such an agreement would be inadmissible. On the other side, it has been said that parol evidence of the acts and conduct of the parties ought to be admitted on the ground

(g) I may mention that Mr. Justice Field who heard the appeal, in the first instance, was of opinion that the evidence had been rightly received, not as evidence of a contemporaneous oral agreement, but as evidence of conduct subsequent to the deed, that the parties had waived the arrangement incorporated in the document, and had, by mutual agreement, evidenced by conduct, treated the transaction as a mortgage, but the distinction appears to be a very refined one, and does not seem to have been accepted by the learned Judges of the Appeal Court.

LECTURE
III.Fraud
and
mistake.Effect of
provisions
of the Evi-
dence Act.

of fraud or mistake. But, it seems to me that this proposition is true only in a qualified sense, and it is very doubtful if the qualification has been attended to in some of the reported cases on the subject. It cannot be denied that, if the terms of an agreement have not been reduced to writing by fraud or mistake, the document may be rectified or reformed by the Court; and as in this country, law and equity are not administered by different tribunals, the Court may in such cases receive oral evidence as a defence to an action founded on the document, instead of relegating the aggrieved party to a suit to have the instrument reformed. A defendant in this country has a right to set up by way of defence in a suit against him upon a written contract, such a state of facts as would justify the Court in amending it in a suit brought expressly for that purpose, and it would seem that such a plea may be raised even in an action in a Small Cause Court (*Freuſen v. Paul*, XII Suth. W. R., 532) (*h*). But before any such evidence can be given, you must first prove that the whole of the terms was not reduced to writing by fraud or mistake. But unless the Court is justified in presuming from the relative helplessness of the borrower, that the lender fraudulently caused the deed to be so prepared as not to truly represent the nature of the transaction, I do not well see how you can allow oral evidence to vary the terms of a written document, unless a proper case is made out for its admission. It seems to me, that in order to lay a foundation for the reception of such evidence, you must first prove that, by fraud or mistake, the document does not correctly represent the nature of the transaction.

It has been sometimes said that such evidence is admissible under proviso (1) of the Evidence Act; but, the fraud mentioned in the proviso clearly refers to contemporaneous, and not subsequent, fraud. A different construction would render the whole section nugatory, for, if the fraud consisted only in the breach of the oral agreement, you could always do what the Legislature says you shall not be permitted to do, that is, give oral evidence of such agreement to vary the terms of the document. No doubt, if it can be shown that the mortgagor, when he signed the

(*h*) The present state of the English law is very similar; *Mostyn v. The West Mostyn Coal and Iron Co.* (1 C. P. D., 145). See Wilson's Judicature Acts, p. 22, notes to (4).

deed, supposed it to be other than what it purports to be, he will be allowed to prove such defence, and oral evidence may in that case be given of the whole agreement, but the mere breach of the oral stipulation would not be sufficient to justify the reception of such evidence. (See *Banapa v. Sunderdas Jagjivandas*, I. L. R., I Bom., 333, and the cases cited therein. See also the judgment of Garth, C.J., in *Cutts v. Brown*, I. L. R., VI Calc., 328; but see *Buksu Lakshman v. Govinda Kanji*, I. L. R., IV Bom., 594, and the judgment of Pontifex, J., in *Cutts v. Brown*, I. L. R., VI. Calc., 328) (i).

As for the ground of mistake, we must bear in mind that even Courts of Equity in England are not in the habit of rectifying instruments, except where there is a clear mistake in reducing the agreement into writing, and owing to the mistake of the draftsman, either in matter of law or of fact, the document does not correctly represent the intention of the parties. It is only where some of the terms are left out by mistake that rectification will be allowed; but there can be no rectification if the parties intentionally omit to reduce into writing all the terms of the actual agreement. If a power to redeem, for instance, is intentionally left out of an instrument under the mistaken notion that its insertion is superfluous, no rectification would be allowed, as the parties never intended that the power should form part of the instrument although the omission was due to a mistake of law; but it would be different if the power was intended to be put into the instrument and omitted by a mistake in the draft. (*Lord Irnham v. Child*, I Bro. C. C., 92; *Lord Portmore v. Morris*, II Bro. C. C., 219; *Lord Townshend v. Stangroom*, VI Ves., 332; *Harbidge v. Wogan*, V Ha., 258). An examination of the cases will, moreover, show that in most, if not in all, instances, where the Court has rectified an instrument, there has been something beyond mere parol evidence; such, for instance, as a rough draft of the agreement or written instructions for the preparation of the deed, or the like.

Parol evidence whether admissible in a case of mistake.

(i) Mr. Justice Pontifex in this case throws out an opinion that it would be open to a party to prove that what is ostensibly a conveyance, was intended to be a mortgage under proviso (2) of Sec. 92 of the Indian Evidence Act, but this view was dissented from by the Chief Justice, and is not reconcilable with the judgment of the majority of the learned Judges in the full Bench case of *Kasinath Chatterjee v. Chandi Churn Banerjee* (V Suth. W. R., 68), where, however, Mr. Justice Norm an, who was in the minority, expressed a similar opinion.

LECTURE
III.Justice
Melvill's
judgment.

I ought to mention that the question of the admissibility of parol evidence of the acts and conduct of the parties was elaborately discussed in *Baksu Lakshman v. Govinda Kanji* (I. L. R., IV Bom., 594), where Mr. Justice Melvill, after pointing out that such evidence may be received, either on the ground of part-performance or of estoppel, sums up his conclusions in these words: "The rule which, on a consideration of the whole matter, appears to be most consonant, both to the statute law and to equity and justice is this, namely, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale; and, thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement."

It is to be observed that the learned Judge in his judgment refers to the practice of the English Court of Chancery, but that practice which has brought upon it the reproach, perhaps not wholly undeserved, of arrogating to itself the functions of the lawgiver, would at the best, be but a very doubtful guide, and would, scarcely justify our Courts in trenching upon the province of the Legislature.

The Specific
Relief Act.

It seems to me that the true rule on this point is formulated in Section 31 of the Specific Relief Act in these words: "When through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved, that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may, in its discretion, rectify the instrument, so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value."

Parol evi-
dence ad-
missible in

It may be perfectly true, as observed by Mr. Justice Melvill, that there is no country in which distressed and

illiterate debtors are relatively so helpless and so much at the mercy of their better educated creditors as in India, but I still think there must be some proof of fraud, apart from the mere fact of the parties standing in the relation of debtor and creditor, to justify the reception of parol evidence; but when once the foundation has been laid, direct parol evidence of the agreement would seem to be equally admissible with evidence of the acts and conduct of the parties; for it cannot be denied that there is, at least, the same danger in admitting in evidence the acts and conduct of the parties as in admitting direct oral evidence of the agreement. There may, for instance, be a conflict of evidence on the question of value, or on the question of transfer of possession, and these facts again may be sought to be accounted for, in various ways, by fraud and perjury. There is no such distinction to be found in the English cases, except where part performance is relied upon as taking a case out of the Statute of Frauds, but Mr. Justice Melvill refuses to rest his judgment on the ground of part-performance as "savouring of over-much refinement," and the learned Judge, therefore, bases his decision, as I understand it, on the sole ground of fraud. I, therefore, find it difficult to bring myself to accept the qualification with which he fences in the rule regarding the admission of oral evidence. It seems to me that you must either admit both kinds of evidence or none. But you cannot shut out one kind and admit the other. It may be that the rules of evidence as formulated in the Evidence Act, are too artificial for the people of this country, but, if so, the remedy for the evil can only be applied by the Legislature. The question is one which our Courts are not unfrequently called upon to decide, and the conflicting decisions on the point show, that the intervention of the Legislature would not be uncalled for.

I hope I shall not be accused of unbecoming presumption if I venture to warn you against the danger of being led away by the usual common places about English Equity, a system which grew up, we must remember, under very peculiar conditions, and whose origin is inextricably bound up with the history of English law. In former times when the Legislature had not broken out into the activity which characterises it at the present day, the functions of the law-maker and the law-expounder were not very sharply defined, and a very thin line divided the respective domains

LECTURE
III.
—
case of
fraud.

LECTURE III. — of the legislator and of the judge. No Court, I think, would venture now, by its judgment, to repeal a statute, and yet this was actually done by the English Judges in Taltarum's Case. Taltarum's case when they virtually abrogated the Statute De Donis, a statute which had been in force for about two hundred years, by what a learned but somewhat irreverent writer calls a piece of solemn juggling (Monahan on The Method of Law, p. 14). The Chancery Judges were certainly not slow to follow the example, if indeed, they were not the first to set it, by frittering away the provisions of not a few Acts of Parliament, when they found themselves unable to accept the principle on which they were based. The same methods which were openly employed in transforming the common law which Equity always professed to follow, were also employed, less openly it is true, but not less effectively in modifying the statute law of the country. But a repetition of such performances will not be suffered in modern times, and I view with dismay, although, I confess, not with surprise, the attempts made, from time to time, to introduce the practice in India (j). Apart from the danger of confusing the boundary which separates the administration of the law from the making of it, the practice can by no means be held up as a pattern for imitation by our Courts. Eminent English Judges, who clearly saw the mischief it was calculated to produce, have occasionally raised their voices against it, and the protest made by Lord Redesdale will not be regarded as at all too strong by those who are familiar with the undisguised attempts of Equity Judges to usurp the functions of the Legislature. "The Statute," said Lord Redesdale, speaking of the Statute of Frauds, "was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in Courts of Equity, than that the relaxation of that Statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been, that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing, whereas, it is manifest, the decisions on the subject have opened a new door to fraud; and, under pretence of

Relaxation
of the Sta-
tute of
Frauds.

(j) See the observations of the Lords of the Judicial Committee in *Thambusawmy Moodelly v. Hossain Rowthen*, I. L. R., I Mad., 1.

past execution, if possession is had in any way whatsoever, means are frequently found to put a Court of Equity in such a situation that, without departing from its rules, it feels itself obliged to break through the Statute." (*Lindsay v. Lynch*, II Sch. and Lefr., 5. See also the observations of Lord Alvanley in *Forster v. Hale*, III Ves., 712, 713.) And even Story, who speaks more cautiously, is obliged to admit "that the exceptions thus allowed, do greatly trench upon the policy and objects of the Statute of Frauds; and, perhaps, there might have been as much wisdom originally in leaving the Statute to its full operation, without any attempt to create exceptions, even in cases where the Statute would enable the party to protect himself from a performance of his contract through a meditated fraud. For, even admitting that such cases might occur, they would become more and more rare as the Statute became better understood; and, a partial evil ought not to be permitted to control a general convenience. And, indeed, it is far from being certain that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith, and the furtherance of justice. These exceptions have also led to great embarrassments in the actual administration of equity; and although, in some cases, one may clearly see that no great mischief can occur from enforcing them, yet in others, difficulties may be stated in their practical application, which compel us to pause, and to question their original propriety." (Story's Equity Jurisprudence, § 765.)

LECTURE
III.

I have said that contractual mortgages may be created either by writing or by parol. They may also be either express or implied. There is one important class of mortgages, —I say class, because in English law they form a class by themselves,—in which the intention to create a mortgage is presumed from the conduct of the parties. Thus, if money is borrowed on a deposit of title-deeds, the Court would infer an intention to charge the property covered by the title-deeds, with the repayment of the money. The transaction, I need hardly point out, is, however, very different from a true legal mortgage which is not based upon any express or implied consent of the parties, although the difference is sometimes veiled by the ambiguity of the term "implied contract" in English law. In English law, a mortgage of

Two kinds of contractual mortgages, express and implied.

LECTURE
III.Equitable
mortgage.Equitable
mortgages
in the mo-
fussil.

this kind is called an equitable mortgage, because, following a well-known maxim, equity regards the transaction in the same light as a formal mortgage; and this sort of mortgage being recognised in equity is called an "equitable mortgage" as opposed to a "legal mortgage." The expression is also applied to similar transactions between natives of this country, although, strictly speaking, it can be properly applied only in a country in which law and equity are administered as two distinct systems.

Equitable mortgages, although common enough in the Presidency towns, do not seem to be very common in the mofussil. We, indeed, find an instance of it in an early case in the Sudder Dewany Adawlut, but the parties to the transaction seem to have been residents of Calcutta, and the difference of opinion between the learned Judges by whom the appeal was heard, shows that the case was one of the first impression, and that the transaction was by no means common at the time. The report of the case to which I refer, is not very full. It would, however, appear that a certain person being indebted to the plaintiff and being pressed for payment, made over to him the title-deeds of certain property. It does not, however, appear that the debtor, when he made over the title-deeds, expressly stated his intention to offer them as a security for the debt. The property was afterwards sold under an execution by the Sheriff, and the purchaser bought with notice of the plaintiff's claim. The plaintiff sought to enforce his lien on the property, contending that the purchaser under the execution had purchased the property subject to his lien. The Zillah Judge having given judgment in favour of the plaintiff, upon the ground that the deposit by the borrower of the title-deeds was equivalent to a mortgage, the decree was affirmed on appeal to the Sudder Dewany Adawlut, although, one of the Judges was inclined to think that the mere delivery of the title-deeds was not sufficient to clothe the creditor with the rights of a mortgagee. (*Laljee v. Govindram*, VI Macnaghten's Sel. Rep., 199.) A few other cases from the mofussil may be found scattered in our books of reports, in which the Court has given effect to a deposit of title-deeds as a valid simple mortgage, but, as I have already told you, this is not an usual mode of giving security outside the Presidency towns. But, although in the mofussil, an equitable mortgagee only obtains a decree for sale, it would seem that a decree for foreclosure may be obtained in the High

Courts in the exercise of their original jurisdiction (*Ram- LECTURE*
narain Bose v. Ramcunny Paul, and *Pertab Chunder III.*
Paulit v. Aslam Holdar, 24th December 1851, cited in
 Macpherson's Mortgage, p. 591. Note (c). But see *Oo*
Noung v. Moung Htoondo, I. L. R., XIII Calc., 322.)

In English law, notwithstanding some difference of opinion at one time, an equitable mortgagee is entitled to foreclosure, whether the deposit of title-deeds is, or is not, accompanied by an agreement to execute a legal mortgage. But, if the terms of the agreement exclude the right to a legal mortgage, the Court can only make a decree for sale. (Fisher on Mortgage, pp. 480—482.)

In the case which I have cited from the Select Reports, the Court inferred an intention to create a mortgage from the mere fact of the delivery of the title-deeds to the creditor. The deposit of title-deeds, however, is not unfrequently accompanied by an agreement, either verbal or written, in which the intention to create a charge is expressly stated. When that is the case, the transaction does not substantially differ from an express conventional mortgage; and there is no reason why, as between parties who can pass land without writing and without delivery of possession, such a transaction should not be given effect to. In a case in the Madras Presidency, in which the local Sudder Dewany Adawlut had refused to recognise the validity of such a transaction, Lord Kingsdown, in delivering the judgment of the Lords of the Judicial Committee of the Privy Council in appeal, is reported to have said: "The decision of the Sudder Dewany Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct, if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against, violates that direction or not. The Court of Appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet, the evidence

Mortgage implied by a delivery of the title-deeds.

If further accompanied by an agreement to create a charge, the transaction is an express conventional mortgage.

LECTURE III. shows that the plaintiff looked not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahommedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one, not of pawn, but of trust. (Hamilton's *Hedaya*, Vol. IV, p. 208, tit. 'Pawns.') It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but as the contracting parties are not both Mahommedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ* exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place, where the contract was made, that is, the English law, the deposit of title-deeds as a security, would create a lien on lands, though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves." (*Varden Seth Sam v. Luckpathy Royjee Lallah*, IX Moore Ind. App., 307.)

Varden
Seth Sam's
Case.

Equitable
mortgages
in England

I have said that equitable mortgages form a distinct group in the English law of securities. It was, however, only very gradually that they found a place in that system, and their ultimate recognition is solely due to the action of the Court of Chancery. The Statute of Frauds provides that all agreements relating to any interest in land must be reduced to writing, and equitable mortgages were supposed to trench upon the Statute. They were, however,

admitted by the Court of Chancery by a somewhat refined distinction between executed and executory contracts. Equitable mortgages appear to have been first recognised by Lord Thurlow, but Lord Eldon and Sir William Grant were both averse to any extension of the doctrine. It was at first attempted to confine the rule only to those cases in which the delivery was made with the object of executing an immediate pledge; but, the doctrine has since been overruled, and equitable mortgages have maintained their ground in English law, notwithstanding the jealousy with which their introduction was at first regarded. We have here an instance, by no means exceptional, in which the law has been compelled to yield to the exigencies of commerce. As observed by Lord Abinger: "In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the Statute." (*Keys v. Williams*, 3 Y. & C., 61.)

LECTURE
III.
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In order to create a valid equitable mortgage, there must be either express evidence of the intention to do so, which may either be by parol, or, by a memorandum in writing, or, partly by parol and partly by writing, or a presumption may arise from the mere delivery of the deeds. (See the cases collected in *White and Tudor's Leading Cases*, Vol. I, pp. 774—788.) But if there is a statement in writing of the circumstances under which the deposit was made, it seems that no parol evidence, inconsistent with such writing, would be admissible (*Baynard v. Woolley*, XX Beav., 583; *Ex-parte Coomb*, XVII Ves., 369).

Memoran-
dum.

A formal mortgage of the equity of redemption is also known in the English law as an equitable mortgage, while the very same name is given to an informal security, an agreement, for instance, to create a formal mortgage, but this is apt to be somewhat misleading. In a recent case in the Calcutta High Court (*The Bengal Banking Corporation v. Mackertich*, I. L. R., X Calc., 315), it was held, that a document which only amounted to an agreement to mortgage, although admissible in evidence as a mere agreement, could not, under the provisions of the Registration Act, be treated as creating an equitable mortgage so as to bind the property. It does not appear that

Mortgage
of the
equity of
redemption,
an
equitable
mortgage.

LECTURE III. — there was any deposit of title-deeds, but it was contended that the agreement ought to be regarded in equity as the same thing as a perfected transaction; but the contention was overruled on the ground that it was directly in opposition to the provisions of the Registration Act. The Chief Justice, in delivering the judgment of the Court, observed: "We all know that there are a great many documents coming within the description of clause (h) which may amount, nevertheless, to what are called equitable mortgages, and so create an interest in land. As such, they would require to be registered, though as mere agreements to mortgage, they, under clause (h), would not. The only way, therefore, of meeting the difficulty, seems to be, to hold that they are available for the one purpose without registration, but not for the other.

Cases on
the point.

This is only extending to that class of cases the principle which we have laid down in the Full Bench case of *Ulfutunnissa v. Hossein Khan* (I. L. R., IX Calc., 520).

"It is clear, that if we are to hold that equitable mortgages, when they are in the form of agreements to mortgage, do not require registration, such instruments would be generally used instead of legal mortgages, for the purpose of avoiding registration; whilst, on the other hand, if we hold that any document which amounts to an equitable mortgage, cannot be used as an agreement to execute a mortgage, we should be defeating the clear intention of clause (h) of the Registration Act."

In England it is settled law, that an equitable mortgage cannot be created by a mere parol agreement, or even by a written memorandum to create a security if it is not followed by an actual deposit of title-deeds. (*Ex-parte Halifax*, 2 M. D. & DeG., 544. *Re Bankhead's Trust*, 2 K. & J., 560.) But a written agreement for a mortgage presently enforceable, may constitute an equitable mortgage. (*Tebb. v. Hodge*, 5 C. P. (Ex. Ch., 73.) A mortgage of future crops is also sometimes spoken of as an equitable mortgage. Such a mortgage is valid, but the transaction is treated as in the nature of an agreement to mortgage. (*Misri Lal v. Mozhafer Hossain*, I. L. R., XIII Calc., 262; *Lalla Tilockdhari Lall v. Furlong*, II Ben. L. Rep., A. C., 230.) But the mortgagor must have a potential interest in that out of which the property may arise. A mortgage by a person of the crops which may grow on land in his possession is valid; but a mortgage by a person of such crops

Mortgage
of future
crops.

on land which he may subsequently acquire would not, it seems, pass even an equitable interest. (*Grantham v. Hawley*, Hob., 132.) The rules of equity are, no doubt, more liberal than those of the common law, but even in equity a naked possibility or a mere expectancy as that of an heir to succeed to his ancestor, cannot be the subject of mortgage, although, in some cases, such transactions may operate as agreements to create a mortgage.

LECTURE
III.

What cannot be the subject of mortgage.

I have already said that the expression "equitable mortgage" is not properly applicable to a transaction between natives of this country, and if I use it, it is only out of deference to long-continued usage. The objection is not a mere verbal one. The case of *Varden Seth Sam v. Luchmiputty Royjee Lallah*, shows the danger of extending technical English expressions to transactions which have only a partial resemblance to one another. In the Madras case, the defendants insisted, in their defence, upon a wellknown doctrine of the English Court of Chancery, and contended that, as purchasers for value without notice, they were protected from the claim of the plaintiff. Now, if you examine the real nature of an equitable mortgage in the English law, and that of a mortgage by delivery of title-deeds in India, you will find a very remarkable distinction. In the English law, an equitable mortgage is only an agreement to mortgage, owing to the incapacity of persons subject to the English law to convey otherwise than by deed. In this country, however, there being no such restriction, a delivery of title-deeds of itself may operate as a conveyance. Now, as I have already explained to you, a contract does not create a real but only a personal right, although English Courts of Equity, proceeding upon a very rational principle, treat the contract as a conveyance as against purchasers with notice of the agreement. In an English Court of Equity, therefore, a purchase for value without notice may be a perfectly good defence to a suit by an equitable mortgagee, but in this country it would not furnish any answer, for, the so-called equitable mortgage not being in any sense a contract for a mortgage but a perfected pledge, the Indian equitable mortgagee has a right superior to that of any person claiming under a title subsequently derived from the mortgagor. It seems to me that the defence in the Madras case, to which I have referred, was suggested by the use of the unhappy expression "equitable mortgage" to denote

"Equitable mortgage" not a proper expression in this country.

Defence of purchase for value without notice.

LECTURE the nature of the transaction. I think I have said enough
 III. to put you on your guard against the misconceptions, which an inaccurate use of technical terms, borrowed from an extremely artificial foreign system, seldom fails to occasion. (See, however, *Bunseedhur v. Heera Lall*, I All. H. C. Rep., 166.)

Equitable
 defence.

Another peculiarity of the English law as regards the plea of purchase for value without notice, is that this defence, known to English lawyers as an equitable defence, was not, until the recent changes tending to the fusion of law and equity, available in a Court of Law; and even in a Court of Equity it seems to be doubtful whether it could be set up against a purely legal title. This is a very fair illustration of the method by which, like the Roman prætors of old, Equity Judges in England remodelled the law under the appearance of only laying down rules of procedure, and indicates the way in which the whole system has been gradually built up. The analogy between the "*exceptiones*" of the Roman law and equitable defences is too close to be overlooked. The Chancery Judge, in effect says to the plaintiff: "We will not give you any assistance against the defendant, a purchaser for value. Go to a Court of Law and there seek such relief as it can give you." (See Snell's Equity, pp. 23—29. *Golla Chinna v. Kali Appiah*, IV Mad. H. C. Rep., 434.)

Case of
 wilful neg-
 lect or
 fraud.

The defence of purchase for value without notice, however, must not be confounded with another defence, which has only a seeming analogy with it, but which is founded upon an altogether different principle. Where one person has by his neglect suffered another to deal with any property in such a manner as to lead an innocent party to believe that the other person is dealing with his own property, an equity arises in favour of the person who has been misled against the person whose negligence has contributed to the result. It is a general principle of equity, that whenever one of two innocent parties must suffer by the act of the third, he who has enabled the third party to occasion the loss must sustain it (*per* Turner, L. J., in *Taylor v. Great Indian Peninsular Railway Company*, IV D. & J., 574). But the principle does not apply where one person has the means of discovering the fraud, or where the negligence is only remotely connected with the transaction, nor does it apply where there is no duty imposed on the person who is guilty of such negligence. (*Swan v. North*

British Australasian Company, II H. & C., 182; *Trustees of Evan's Charity v. Bank of Ireland*, 5 H. L., 389; *Vandeleur v. Blagrave*, XVII L. J., Ch., 45.) This doctrine is not founded upon any technical ground, and there can, therefore, be no objection to the recognition of the principle by our Courts. The distinction between the two pleas is well illustrated by the recent case of *Durga Prosad v. Shumbu Nath*, (I. L. R., VIII All., 86), where it was held that, although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it, would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for valuable consideration, when clothed with the legal title, has no applicability in the Courts of British India.

LECTURE
III.
—Equitable
defence re-
fused by
the Allaha-
bad High
Court.

I have already stated that the deposit of title-deeds is sometimes accompanied by a memorandum in writing, setting forth the nature of the transaction. Even in this case, however, the memorandum is not the contract between the parties; but, the contract is implied by the Court from the deposit of the title-deeds and the advance of the money on such deposit. In the case of a mortgage in writing, if the instrument is unregistered, the mortgagee cannot, generally speaking, enforce his security against the land, because the contract is evidenced by the instrument itself, and if the writing is inadmissible, no other evidence is allowed to be given. In the case, however, of a mortgage by deposit of title-deeds, although there may be a memorandum in writing, it is not looked upon as the instrument creating the mortgage, but, as observed by the Court in *Kedarnath Dutt v. Sham Lal Khettry*, "The mortgage is created by the agreement which is evidenced by the loan and the deposit of the title-deeds. The mortgagee may, therefore, rely upon the parol agreement, which is implied by the deposit of the title-deeds." The distinction is an important one, and requires to be illustrated by one or two cases in which the question has been discussed. In the case of *Kedernath Dutt v. Sham Lal Khettry*, to which I have already alluded, the facts were shortly these. The plaintiff, who asked the Court to declare his rights as an equitable mortgagee on certain premises, had advanced to Woomachurn Banerjee a certain sum of money on the deposit of the title-deeds

Memoran-
dum not
the con-
tract.*Kedernath
Dutt v.
Sham Lal
Khettry.*

LECTURE III. of some property belonging to the borrower. Woomachurn also executed a promissory note, whereby he promised to pay to "Sham Lal Khettry or order, the sum of Rs. 1,200, with interest at the rate of 24 per cent. per annum, for value received in cash." There was an endorsement on the promissory note in these words: "For the repayment of the loan of Rs. 1,200, and the interest due thereon of the within note-of-hand, I hereby deposit with Babu Sham Lal Khettry, as a collateral security, by way of equitable mortgage, title-deeds of my property situate at No. 11 in Fucker Chand Mitter's Street at Mirzapore in Calcutta." (Sd.) "Woomachurn Banerjee." There was some question as to whether the transaction was completed when the promissory note was given, but the Appellate Court thought that the question whether there was a complete equitable mortgage before the promissory note was given, or, whether that was the completion of the transaction, was not material. It seems, that after the deposit of the title-deeds, the property was sold under an execution against Woomachurn, and purchased by the defendants Kedernath Dutt and Madhub Chunder Bose. These defendants resisted the plaintiff's suit on the ground, that the mortgage was created by an express agreement which was reduced to writing, and, as the endorsement was not registered, the plaintiff could not enforce any claim against the land which, as I have already said, had intermediately passed to them under an execution against Woomachurn Banerjee. The objection, however, was overruled. Sir Richard Couch, in giving the judgment of the Court, observed: "The rule with regard to writings is, that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is, that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds. The

promissory note, whether given either at the same time or some hours afterwards in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, *viz.*, that the interest should be at the rate of 24 per cent. LECTURE
III.
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“But, as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage nor the agreement to give a mortgage, for the Rs. 1,200 : it is nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds. It is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced. Memoran-
dum sim-
ply evi-
dence of
deposit.

“On the ground, therefore, that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act.” (*Kedarnath Dutt v. Sham Lall Khettry*, XX Suth., W. R., 150 ; XI Ben. L. Rep., 404. See also *Ruploll Mitter v. Ramlochan Sircar*, Suit No. 516 of 1877, unreported ; also *Oo-Noung v. Moung Htoon-oo*, I. L. R., XIII Calc., 322.)

There is another case to be found in the books (*Jivandas Keshavji v. Framji Nanabhai*, VII Bom. H. C. Rep., 45, O. C.) which is somewhat stronger. In that case the plaintiff had agreed to lend a certain sum of money to Devji Keshavji, on a deposit of the title-deeds of certain property belonging to the debtor. The title-deeds having been deposited, the plaintiff continued to advance certain sums of money, from time to time, till the whole sum advanced amounted to that which the plaintiff had originally agreed to advance. On the 13th of June 1865, after the Registration Act of 1864 had come into force, and when the last advance was made, a Guzerati document was executed by the debtor in which, after stating the Bombay
case on the
point.

LECTURE amounts which had been advanced from time to time by
 III. the plaintiff, the debtor proceeded to say: "According to these particulars I have received or borrowed from you, at interest, Rs. 25,000 in cash and currency notes. On account of the same, there are mortgaged at your place my piece of land at Naigani, namely, a garden with a building (or) a bungalow, which (land) is registered under No. 36 in the Collector's books, and the building or dwelling-house built on the said piece of land, which is registered under No. 9 in the books of the House-assessment Collector. All the deeds and other 'vouchers' relating to the said land having been left in mortgage at your place, Rs. 25,000, namely (Rs. twenty-five thousand) have been received (or borrowed) at interest thereon for an unlimited time."

Security
 created by
 delivery of
 the deeds.

This document was not registered; and the question arose whether the writing being inadmissible in evidence, the plaintiff could enforce his rights as mortgagee. The question was answered in the affirmative; and Mr. Justice Bayley, in giving judgment, is reported to have said: "I consider that the contract for a security on the land was created when the loan was applied for, and, agreed to, and the deeds were handed over to Karsandas; and that the receipt then, and those subsequently, given, did not—nor did the Guzerati document of the 13th of June 1865, on which day Rs. 25, the last instalment of the Rs. 25,000, was advanced—create or declare any right or interest within the meaning of the Registration Acts. The rights of the parties, be they legal or be they equitable, had already been created and perfected on the 31st of October 1864, and it required no memorandum or writing to render such rights valid; nor, in fact, was there evidence that any such document, or any deed or writing, was, on the 31st of October 1864, contemplated by the parties. Suppose the receipts and the instrument of the 13th June 1865 had never existed, the lien or charge on the property would still, in my opinion, have been perfect and valid. The fact of such an informal native document having been subsequently given, and executed after the transaction had been completed, cannot, I think, in any way be held to affect the validity of that which Sir Lawrence Peel, in the Calcutta case, calls '*a perfected contract of pledge*,' or, to borrow the words of Lord Kingsdown, a '*contract which created between the parties a lien on the land.*'"

"In general, no doubt, where a contract has been reduced into writing by the parties, the writing is the best evidence of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle, a receipt for money given on unstamped paper, will not exclude parol evidence of the payment, and the paper on which it is written may be produced, not as evidence of itself, but as a material memorandum, which a witness who saw it given, may refer to, and give parol evidence of the fact of payment—*Rambert v. Cohen* (IV Esp., 213); I Taylor on Evidence, p. 412, 5th ed. So, a verbal demand of goods, is admissible in trover, though a demand in writing was made at the same time. *Smith v. Young* (I Campb., 439). The fact, too, of birth, baptism, marriage, death, or burial may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care. (I, Taylor on Evidence, p. 413.)"

LECTURE
III.Parol evidence when
admissible.

The above cases, however, must be distinguished from another class, of which you will find an instance in the case of *Dwarkanath Mitter v. Saratkumari*, (VII Ben. L. Rep., 55, O. C. J.). In that case, the title-deeds were deposited with a letter which stated that they were delivered to the creditors as collateral security for the twenty thousand rupees which fell due on that date, and, the Court pointed out, that the letter explained why the deeds were deposited, and that the case was, therefore, not one in which the charge would be implied from the deposit itself, nor was the equitable mortgage made expressly by parol. You will observe that, in this case, there was no evidence of an agreement to give a mortgage, such as the loan of the money accompanied by the deposit of title-deeds. Without some letter or verbal communication, there would have been nothing to connect the debt which had been incurred

Title-deeds
deposited
with a
letter.

LECTURE with the deposit of the deed. The mere possession of the title-deeds by the creditor without evidence of the contract upon which the possession originated, or at least, of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security. (*Dixon v. Muckleston*, L. R., VIII Ch. App., 155; *Gunput v. Adarjee*, I. L. R., III Bom., 312. See also *Neve v. Pennell*, II Hemming and Miller, 170. Distinguish *Russel v. Russel*, I White and Tudor, L. C., 773).

*Jaitha
Bhima v.
Haji Ab-
dool Syad
Oosman.*

The recent case of *Jaitha Bhima v. Haji Abdool Syad Oosman*, (I. L. R., X Bom., 635) is also a very instructive authority on equitable mortgages. It appears from the report that the plaintiff having consented to lend Rs. 10,000 to the defendant, the latter deposited with him, on the 2nd April 1883, the title-deeds of a certain property. On receiving them, the plaintiff told the defendant that he would take them to his attorney, have a deed drawn up, and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff (*i. e.*, the 2nd April 1885) there was no existing debt due by the defendant to the plaintiff. On the 6th April 1885, the mortgage-deed was executed, and, on the same day, the money was advanced by the plaintiff to the defendant. The plaintiff stated that he had advanced the money on the security of the title-deeds on the same day. He did not say how long before the execution of the deed the money had been paid; but the deed itself recited that the Rs. 10,000 was paid immediately before the execution of the mortgage. The mortgage-deed was not registered. The plaintiff stated that he knew that it required registration, but that it was left unregistered at the request of the defendant, who did not wish to be exposed in the eyes of the public.

The plaintiff sued for a declaration that he was entitled to an equitable mortgage upon the said property, and for the sale thereof, in default of the payment of the mortgage-debt. He contended that the loan had been made on the security of the title-deeds which had been deposited on the 2nd April; that he had, no doubt, intended to obtain a legal mortgage, but that he had abandoned that intention

by consenting to leave the mortgage-deed unregistered, and had, on the 6th April elected to rely upon his equitable mortgage. It was, however, held, that the plaintiff had no equitable mortgage. At the time when the deeds were deposited, there was no antecedent or existing debt, nor was there any oral agreement that the title-deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed. It was clear that if the defendant had not been ready to execute the deed, no advance would have been made. The money was, therefore, really advanced on the security of the mortgage-deed, though, at the time the money was advanced, the plaintiff had the title-deeds in his possession.

In delivering judgment, the Court observed: "When there is a debt in existence, and title-deeds are deposited by the debtor with the creditor to secure the debt, an equitable mortgage is at once created; and that is so, even though the deeds are deposited for the express purpose of having a legal mortgage prepared (see *Dayal Jairoj v. Jivrajratami*, I. L. R., 1 Bom., 237, and the cases therein cited); and I apprehend the law to be the same, when title-deeds are deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the land comprised in the title-deed, from the force of the prior oral agreement that it shall be so. (*Jivendas v. Framji*, VII Bom. H. C. Rep., 45, O. C. J.; *Ex-parte Langston*, XVII Ves., 227; *Ex-parte Whitbread*, XIX Ves., 209; *Ex-parte Kensington*, II V. and B., 79).

"In Seton on Decrees, p. 1131, the law is thus stated: 'If deeds are delivered to enable a legal mortgage for securing an existing debt to be prepared, then an equitable mortgage is completed; *secus* if to secure a fresh loan yet to be made. For this proposition, see *Hockly v. Bantock* I. Russ., 141; *Keys v. William*, III Y. and C., 55; and *Ex-parte Bruce*, I Russ., 374, are cited. The *secus* is borne out by the following passage from the judgment in *Keys v. William*, III Y. and C., p. 61. 'Certainly, if, before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing,

LECTURE III. although they may be deposited only for the purpose of preparing a future mortgage. In such case, the deeds are given in as part of the security, and become pledged from the very nature of the transaction.

Effect of
delivery of
deeds.

"In the present case, when the deeds were deposited with the plaintiff, there was no antecedent or existing debt, nor was any oral agreement made that the title-deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed; and there is no doubt that, had the insolvent not been ready to execute the deed, no advance would have been made. The money was really advanced on the security of the mortgage-deed, though, at the time the money was advanced, the plaintiffs had the title-deeds in their possession. That is so, however, in the case of almost every legal mortgage. The question resolves itself into this. Does a mortgagee in possession, (as he usually is) of the title-deeds of his mortgagor, obtain an equitable mortgage when he actually advances money upon the security of a legal mortgage about to be executed, and when such legal mortgage, by reason of not being registered, never operates as a mortgage? To hold that he does, would, to a considerable extent, defeat the policy of the registration law. It would be also implying an agreement which is really contrary to fact, but yet is an agreement which parties would probably enter into on all occasions, were the desirability of it to occur to them. If, however, they expressed it in words, the provisions of section 92 of the Evidence Act (I of 1872) would exclude it from the consideration of the court. The application of the maxim, '*expressio facit cessare tacitum*,' would, as upon similar principles, I think, exclude the implied agreement. (See *per* Lord Cairns in *Shaw v. Foster*, at page 340, of the L. R., V Eng. and Ir. App., p. 321.) The plaintiffs' possession of the title-deeds is properly referable to the fact of the premises having been conveyed to them, and to their, therefore, being entitled to the deeds; but they have not taken the proper steps to make that conveyance to them effectual in law.

"The case for the plaintiffs is put thus: If the money had been advanced, and the legal mortgage had not been executed, there would have been a good equitable charge upon the premises. Is not the result the same when the parties do not choose to complete the mortgage they have

executed by registration? Assuming, for the sake of argument, that the proposition enunciated is, in the absence of an agreement to that effect, sustainable, the answer is, that the Evidence Act, section 92, and the maxims I have referred to in the former case, have no application, while in the latter they apply. It is said the parties have, in fact, waived the completion of the legal mortgage, but I think this is not the correct view. There is no direct evidence to that effect; and, in fact, they have not waived it. The interest was paid in respect of the mortgage; and its receipt was endorsed upon the mortgage-deed. They have only omitted to take the steps requisite to enable a court to give effect to its terms.

LECTURE
III.
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"*Sumpter v. Cooper* (II B. and Ad., 223), is relied upon as an authority in favour of the plaintiffs' view. In that case, however, the deeds were deposited, in 1827, to secure a present advance of £500, and a good equitable mortgage was then created by deposit of title-deeds. It was held that a subsequent invalid assignment, in March 1828, of the premises to the equitable mortgage, did not affect his prior valid equitable mortgage. *Hiern v. Mill*, (XIII Ves., 114) has also been referred to. In that case, also, the deeds were deposited to secure a present advance, and were to be retained as security for such advance, till a legal mortgage should be prepared and subsequent advances were also expressly made upon the same security. The legal mortgage was not executed, and the equitable mortgage was held to be valid.

"In *James v. Rice* (V DeG. M. and G., 461), the deeds were in the hands of the plaintiff, and there was a parol agreement to give him a legal mortgage to secure an existing debt. This was held to create a valid equitable mortgage.

"I have not been able to find any English case on all fours with the present.

"In the case of *Dwarka Nath Mitter v. Sarat Coomari Dassi* (VII Ben. L. Rep., 55), the title-deeds were sent with a letter stating that they were to be held as security for an antecedent debt. The letter was not registered, though it needed registration, and, therefore, could not be given in evidence. The holder of the title-deeds sued, in effect, to establish an equitable mortgage; but though he had the title-deeds in his possession, as he had no proof of the equitable mortgage other than the possession of the deeds his suit was dismissed.

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"That case was recognised and distinguished in *Kedar Nath Dutt v. Sham Lal Khettry* (VII Ben. L. Rep., 55). In the latter case, the equitable mortgage was upheld, as the unregistered letter was but a record of the deposit of the title-deeds and of the purpose of such deposit, and, therefore, was admissible in evidence. The reasoning of the court seems to assume that, had it contained the terms of the contract between the parties and purposed to create a charge upon the land, the decision would have been against the plaintiff." (*Jaitha Bhima v. Haji Abdool Syad Oosman*, I. L. R., X Bom., pp. 644—647)."

Summary
of deci-
sions.

The authorities, therefore, show that where the conduct of the parties is such as to raise the inference of a mortgage, such conduct may be relied upon, although there may be a statement of fact in writing from which the same inference may be drawn. If, for instance, I borrow money on the deposit of title-deeds, I may state the fact of deposit in writing, but the writing will not be the only evidence of such deposit, which may be proved by other means. If, however, a formal document is executed, I apprehend, such document must be taken to be the only evidence of the transaction, although there are certain expressions in the judgments of the Bombay Court which may lead to the inference, that even in such cases the parties may, so to speak, go behind the writing, and rely upon the deposit coupled with the advance.

When title-deeds are deposited with the express intention to secure an antecedent debt or a present advance, or under circumstances from which it may be inferred that they are deposited with such intention, and, subsequently the depositor executes a formal mortgage which for want of registration, or for some other reason, cannot be given in evidence, it has been said that the formal mortgage or document does not destroy or impair the prior valid equitable charge. (*Jeebon Dass v. Framjee*, VII Bom. H. C. Rep., O. C. J., 45; *Jeyetha Bheema v. Haji Abdool*, I. L. R., X Bom., 634.) It appears to me, however, that if an equitable mortgage is to be regarded as founded on the express or implied consent of the parties, and not upon an obligation attached by the law itself, quite apart from any question as to the intention of the parties themselves, in other words, if it is founded upon an implied, and not upon a *quasi*-contract, the proposition is open to considerable doubt. (See the observations of Macpherson J. in

Equitable
mortgage
how creat-
ed.

Rahumutoolah v. Shuriatoolah, X Suth. W. R., F. B., 60.) LECTURE
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It seems to me, with very great deference, that the fallacy which underlies the proposition, like others which cluster round an ambiguous term, is veiled by the obscurity of the expression 'implied contract' in the English law.

From what I have already said, it is clear that a mere memorandum, accompanying a deposit, is not a document the registration of which is compulsory. I have gone at some length into the matter, because I think the nature of what is called an equitable mortgage, cannot be properly understood without a careful study of the distinction between mortgages of this class, and those I have called express conventional mortgages; and this distinction is very clearly brought out in the cases in which questions of the admissibility of the memorandum, which sometimes accompanies the deposit, have been raised.

It would seem that an equitable mortgage, although it may be accompanied by a writing, is still only a parol mortgage, and, therefore, liable, generally speaking, to all the disadvantages imposed by the law on parol transactions. But it has been recently held, that it is not an oral agreement within the meaning of the Registration Act (*Cogan v. Pogose* I. L. R., XI Calc., 158). In giving the judgment of the Court, Pigot, J., observed: "An oral agreement under this section must be understood to mean, so far as the present question is concerned, an agreement merely oral. Now, a mortgage by deposit of title-deeds may well be created without any expression of agreement in words at all; the essence of the transaction is the deposit of the deeds, on which the mortgage becomes complete. No doubt, as one consequence of it, the mortgagee may be entitled to a registered conveyance, but that right is an incident of the transaction, and is not of the essence of it; and, hence, I do not think counsel's argument can govern the decision of this question,—viz., that argument in which he contended that an equitable mortgage was an agreement to execute a conveyance. It is, in itself, a mortgage, and carries with it a right to a conveyance; but, this is not the essential character of the transaction. It is a complete act, and not an executory agreement. For these reasons I do not think the case comes under section 48." The learned Judge added: "The matter is of less importance, having regard to the provisions of sections 58 and 59, Transfer of Property Act. From the last paragraph of the latter

Registration of memorandum not compulsory.

Equitable mortgage not an oral agreement.

Cogan v. Pogose.

LECTURE III. section, it would appear that, where the Act is applicable, equitable mortgages outside the towns of Calcutta, Bombay, Madras, Karachi, and Rangoon, are no longer valid." It cannot, however, be denied that an equitable mortgage is as much within the mischief of the Act as an ordinary verbal agreement, and it may well be doubted, whether the judgment sufficiently distinguishes *quasi-contracts* from implied agreements properly so called.

Registration in England.

In England, where there is no writing—but the equitable mortgage is created merely by the deposit of title-deeds—the necessity for registration does not arise. There is, in fact, no instrument which can be registered under the Act (*Sumpter v. Cooper*, II B and Ad., 223); and a creditor, having a lien which may be created without any writing, is not bound to obtain written evidence in order to protect himself by registration. (*Kettlewell v. Watson*, XXI Ch. D., 685.) If the equitable mortgage, however, is accompanied by a writing, it will not be available against a subsequent mortgagee, whose mortgage has been duly registered without notice of the deposit of the title-deeds. (*Hewitt v. Loosemore*, IX Hare, 449; *Allen v. Knight*, V Hare, 272; *Farron v. Rees*, IV Beav., 18; *Worthington v. Morgan*, XVI Sim., 547.)

General hypothecation invalid.

To go back: Every species of property, whether moveable or immoveable, which can be alienated, may be also the subject of mortgage; but it seems that a general hypothecation will not be recognised as valid by our Courts. (*Mullick Bashoo v. Goor Bukoh Gir*, N.-W. P., Vol. VII, p. 265; *Chunder Kishore v. Gooroo Churn*, S. D. A., 1855, p. 353. Cf. *Manick Chand v. Beharee Lall*, II All. H. C. Rep., 263.) A covenant to convey and settle lands will not confer a specific lien on the lands of the covenantee, but the covenantee will be a creditor by specialty (*Sugden's Vendors and Purchasers*, p. 711); and this rule has been adopted by our Courts. (*Najibulla Mulla v. Nasir Mistri*, I. L. R., VII Calc., 196; *Gunoo Singh v. Latafut Hossain*, I. L. R., III Calc., 336; *Deojit v. Pitamber*, I. L. R., I All., 275; *Bhapul v. Jagram*, I. L. R., II All., 449; *Ram Buksh v. Sookh Deo*, I All., H. C. Rep., 159; *Chonnee Lall v. Puhulwan Singh*, H. C. R., N.-W. P. 1868, p. 270; *Bheri Dorayya v. Maddiputu Ramayya*, I. L. R., III Mad., 35.) But it is not essential that the property should be described by name; and in this, as in other cases, oral evidence is admissible to prove identity. (For an

instance, see *Kanhia Lall v Muhamad Hossain Khan*, I. L. R., V All., 11.) The question, however, appropriately belongs to the law of evidence, and can scarcely be said to fall within the province of this lecture. I may mention that the question of the validity of general mortgages, is not now of much practical importance, as no document which does not sufficiently specify the property comprised in it, can be registered, and a general hypothecation, therefore, cannot under the law be created by a registered instrument. (As to the English law on the subject, see Fisher on Mortgage, pp. 18—19. See also *In re Clarke*, 35, C. L. D., 109. Compare *Ramsidh Pande v. Balgobind*, I. L. R., IX All., 158.)

As regards the power to mortgage, it may be said that, generally speaking, a mortgage being a qualified alienation, the same rules which regulate the power to sell, also regulate the capacity to mortgage. A detailed examination of these rules—which you will find in Mr. Justice Macpherson's treatise on Mortgages—would be beyond the scope of the present lectures. A doubt may, however, sometimes arise when trustees are empowered to sell, and no express power to mortgage is given. The law on the subject in England is, that a trustee empowered to sell is not, in the absence of any indication to the contrary in the language of the instrument, competent to create a mortgage; but the rule is obscured by a cloud of verbal distinctions and can be disentangled only by a careful study of the authorities on the subject. (See the cases collected in Lewin on Trusts, p. 425.)

The question whether a direction to sell would authorize a mortgage was discussed in the case of *Sreemutty Dino Moye Dossee v. Tara Chand Kundoo*. (Bourke's Reps., A. O. C., 48; III Suth. W. R., Mis App., 7, note.) The will in that case contained a direction by the testator that the executor should sell his property at a reasonable price and liquidate his debts. In giving judgment Sir Barnes Peacock said "A direction to sell a house does not necessarily include a power to mortgage the same. A direction to sell a house, and to invest the surplus in Government securities, is a very different thing from a direction to borrow a large sum of money at 15 per cent, or some other higher rate of interest. The case of *Holdenby v. Spofforth* (1 Beavan, 390) shows that a trust 'to make sale or dispose of' the testator's real estates, does not authorise a mortgage, there appearing an intention on the part of the testator that

LECTURE
III.Capacity
to mort-
gage.Rights of a
trustee
with limit-
ed powers.*Dinomoye*
v.
Tarachand.

LECTURE the whole estate should be converted. And, in the present
 III. case, we think that the clear intention of the testator was that, if it should become necessary to raise money for the purposes of his estate, the house in Calcutta should be sold, and the surplus proceeds, if any, invested in Government securities. When a testator says that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the house is not to be mortgaged, more especially, that it is not to be mortgaged at a high interest, which must, almost necessarily, be injurious to the estate."

Power how construed. I may mention that powers are generally construed with some degree of strictness. A power of attorney, for instance, containing a clause empowering a person to sell or mortgage the donor's property for the payment of his debts, would not authorise the execution of a simple money-bond to one of the donor's creditors for payment of the money due to him; a simple money-bond being an instrument of a different nature from a mortgage-bond. (*Poorna Chunder Sen v. Prosunno Coomar Das*, I. L. R., VII Calc., 253.)

Right of executor. I must tell you that, under the English law, an executor or administrator has full power to dispose of the assets in his hands, and, in case of an alienation, the assets cannot be followed by the creditors of the deceased. Similar powers may be exercised by an executor or administrator under the Indian Succession Act, section 269; and the transferee is not bound to see to the application of the purchase-money. "His title is complete by sale and delivery: what becomes of the price is no concern of his." (*Per Lord Thurlow, in Scott v. Tyler*, II Dick, 725.) The same observation applies to mortgages; and a mere direction for the payment of his debts by the testator, makes no difference in the right of the executor to deal with the assets in any manner that he thinks fit. If, therefore, an executor pledges a portion of the assets, a creditor who should purchase under an execution against the general assets, either real or personal, would take only subject to the charge created by the executor. (*Nilcanta Chatterjee v. Peary Mohan Dass*, III Ben. L. Rep., O. C., 13.) But if the mortgagee knows that there are unsatisfied debts of the testator, and that the executor intends to apply the money otherwise than in the payment of such debts, he will not acquire a good title.

The executor of a Hindu will has, under the Hindu Law, only a limited power of dealing with the property of the testator; and his authority, in the absence of any directions contained in the will, is subject to the same restrictions as that of the manager of an infant under the Hindu Law as explained in the well-known case of *Hannuman Prosad Pandey* (VI Moore Ind. App., 293). A mortgage by an executor under a Hindu will can, therefore, be only justified, either by the directions given by the testator in his will, or by the exigencies of the estate. (*Joykalee Dabee v. Shib Nath Chatterjee*, III Ben. L. Rep., O. C., 4; I Suth. W. R., 33. Cf. XIV Ben. L. Rep., 49; *Laganada v. Ramovame*, I Mad. H. C. Rep., 384; *Rooplal Khettry v. Mohima Chunder Roy*, X Ben. L. Rep., 274 note. But see *Ashutosh Day v. Mohesh Chunder Dutt*, Fulton's Rep., 380. Cf. *Sreematty Dassi v. Tarachand Kundoo*, Bourke's Rep., A. O. C., 48; *Rooplal Khettry v. Mohima Churn Roy*, X Ben. L. Rep., 271—274 note.)

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Executor
under Hin-
du law.

The Hindu executor takes no estate—to use the phraseology of the English law—but only possesses a power of management. If, therefore, the will gives him a power to make a mortgage for a specific purpose, it is the duty of the mortgagee to see that the power is strictly followed. If the will, however, gives the executor generally an authority to pay the testator's debts out of the estate, the transferee need not look further than the will itself.

Hindu ex-
ecutor
takes no
estate.

The Hindu Wills Act gave the executor the same powers as those conferred by the Indian Succession Act, but they have since been modified by the Probate and Administration Act (V of 1881), which now regulates the powers of executors as well as administrators in cases not falling within the provisions of the Indian Succession Act. It is true, that an executor or administrator may still, in the exercise of his discretion, dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit, but such power cannot be exercised except with the sanction of the Court (see Chapter VI of the Probate and Administration Act).

Hindu
Wills Act.

Persons under disability, such as minors and lunatics, are also incapable of creating a valid mortgage. The rights of persons appointed to take charge of their estates, are now regulated by Statute in most parts of the country, and it seems that acts, not done in strict conformity with the directions of the Statute, will be absolutely void.

Persons
under dis-
ability in-
capable of
creating a
mortgage.

LECTURE (Chinuman Sing v. Subram Kuar, I. L. R., II All., 902;
 III. Manji Ram v. Tara Sing, I. L. R., III All., 852.)

Case of a
 minor.

It has been held in Bengal, that a guardian of a minor, not appointed by the Court, is not fettered by the restrictions imposed by the Minors' Act, but may rely upon what is called the common law which gives him authority to mortgage his ward's estate under certain conditions. I will conclude by observing that the question as to how far a minor may ratify a mortgage made by him during his minority, and as to whether such a ratification can take effect to the prejudice of an intermediate incumbrancer in cases unaffected by statute law, is by no means clearly settled, and the writings of civilian as well as English lawyers, show, that the question is beset with considerable difficulty. (Burge's Foreign and Colonial Law, Vol. III, pp. 166—170; Pollock's Contract, pp. 52—63.)

Accessions
 to pledge.

I shall now proceed to discuss the rights of the mortgagee, when the property pledged to him has received any accession, or undergone any alteration. The general law on the subject is that the creditor has not only a right against the property mortgaged to him, but also to any augmentation or increase. (Story on Bailment, § 292.) Thus, to take a familiar illustration, if a flock of sheep is mortgaged, the creditor acquires the same rights to any natural increase, as he has against the animals which composed the flock at the time of the mortgage. On the same principle, accessions to the mortgaged property by alluvion, become subject to the mortgage. Similarly, the goodwill of a business carried on upon the mortgaged premises; and, therefore, any compensation which may be paid for it under the Lands' Clauses Act will follow the security. (*Pile v. Pile*, III Ch. D., 36.) I may add that in some systems of law, the right of the mortgagee to whom land has been pledged, extends to any buildings which may be subsequently erected by the debtor on the land.

Mortgagee's right
 to the
 accessions,
 only a
 qualified
 right.

But the mortgagee has only a qualified right in the accession and is liable to be redeemed by the mortgagor. Thus, for example, in *Bakshiram Gangaram v. Darku Tukaram* (X Bom. H. C. Rep., 369), where the mortgagee, by virtue of his possession as mortgagee, purchased certain trees from the Crown on favourable terms, it was held that the trees became, by the sale, an increment to the mortgaged estate, and that the mortgage was liable to be redeemed on payment of the mortgage-money with interest,

together with the money laid out in purchasing the trees and other reasonable expenses. The mortgagee could not equitably claim more than the benefit, as a security, of the addition to the property. So, also, if a village without specified boundaries is mortgaged, the mortgagee is, on the one hand, entitled to it as a security with any casual increase which may occur to it, and is, on the other hand, subject to redemption by the mortgagor to the same extent. (*Sadashiv Anant v. Vithal Anant*, XI Bom. H. C. Rep., 32.) In the last case, the Court expressed an opinion that if the boundaries had been precisely laid down by topographical references, the case might have been different. But I think that in a case of alluvion in this country, the mortgagee would, in the absence of any express contract to the contrary, be entitled to treat it as an accession to his security.

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But the leading case on the point is *Kishendatt Ram v. Mumtaz Ali* (I. L. R., V Calc., 198), in which it was laid down by the Privy Council that the English law which treats most acquisitions by a mortgagor as enuring for the benefit of the mortgagee, and, conversely, most acquisitions by the mortgagee, as accretions to the mortgaged property or substitutions for it, is founded on equity and good conscience, and may be applied in the case of Indian mortgages. In that case the Privy Council allowed the mortgagor to redeem certain Birt tenures, originally carved out of the mortgagor's estate, and afterwards bought in by the mortgagee and treated by him as merged in the superior talukdary title. It also appeared in evidence that the mortgagee had taken advantage of his position of talukdar *de facto* in acquiring the Birts. Their Lordships say in the course of their judgment: "There was some discussion at the bar on the English decisions, upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would, of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable, because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognise the general equity of the principle, and show how it has been applied by the Courts of this

Leading
cases on the
point.

Kishendat
Ram's
Case.

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country. It is, therefore, desirable shortly to notice the arguments on this point. It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognized by English law to the extent, *viz.*, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are, in like manner, treated as accretions to the mortgaged property or substitutions for it, and, then, subject to redemption. The law laid down in *Rakestraw v. Brewer* (II P. W., 511) as to the renewal of a term obtained by the mortgagee of the expired term, being 'as coming from the same root,' subject to the same equity, has never been impeached. The English case, which in its circumstances comes nearest to the present, is that of *Doe v. Patt* (II Doug., 710), in which the principle was enforced against a mortgagor. It was there held, that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure for the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if, by reason of his position as mortgagee in possession, he had had peculiar facilities for obtaining the surrenders."

To borrow the words of Lord Chancellor Nottingham: "The mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit." But the mortgagee is not under an absolute disability, and a lease *bonâ fide*, renewed after notice to all persons interested, has been held to be not in trust for the mortgagor. (*Nesbitt v. Tredinnick*, I Ba. and Be., 29.)

*Leigh v.
Burnett.*

The principle of treating any acquisitions, which may be made by the mortgagor in respect of the property mortgaged by him as part of the security, was carried to a very great extent in a recent English case (*Leigh v. Burnett*, XIX Ch. D., 231). It appears that an ecclesiastical lease of a house for a term of years, which was renewable by custom, though it contained no covenant by the lessors for renewal, was mortgaged to the defendant, and the equity of redemption in the leasehold estate was afterwards assigned to a third party for value. The Ecclesiastical Commissioners, in whom

the reversion had become vested, refused to renew the lease; but, before the lease expired, they agreed to sell the reversion to the assignee, but the conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress, the assignee borrowed from the plaintiff a certain sum of money; the memorandum given to the plaintiff at the time of the loan, stated that the money was to be secured by a mortgage of the house "as soon as he had completed the enfranchisement of the property from the Commissioners." It was contended on behalf of the plaintiff, who had no notice of the previous mortgage, that the assignee of the equity of redemption was not under an obligation to purchase the reversion, and that it could not be supposed that he intended to make a present of it to the mortgagee of the lease. It was clear that his security would have been of no value if the lease had simply expired; why then, it was asked, should he obtain the benefit of the purchase of the reversion without paying the purchase-money? But the Court held that the plaintiff was not entitled to priority over the mortgagee of the lease. In giving judgment, Mr. Justice Pearson said, "To my mind there is a grievous fallacy in this argument. I can only treat Newman as the mortgagor of the lease; and, in that character, he could hold the reversion only on the same terms as he would have held a renewed lease of the property. The doctrine of this court has always been, that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. The case of *Rakestraw v. Brewer* (2 P. W., 511) is an illustration of this doctrine. There, the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, and it was held that the new term was subject to the old equity of redemption. If Newman himself were here, he would be entitled to redeem the reversion on paying off the mortgage, but he would not be entitled to say to the mortgagee of the lease. 'I bought the property for your benefit, and you can only have it on paying me the purchase-money which I gave for it.' I cannot understand how any one who claims through Newman can be in any better position than he would have been. It is impossible for the plaintiff to say that, in respect of the purchase-money paid by Newman, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a

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Indian decisions do not carry the doctrine to the same extent as the English cases.

Difference between mortgagor and mortgagee.

claim if she had advanced the money to buy the reversion; but, that would be because she had no interest in the property through Newman, but was giving up a purchase on the terms of being repaid what she had given for it. As it is, she has only a derivative title through Newman, and he could not have maintained such a claim against the mortgagees of the lease." (29, Ch. D., pp. 234—235.)

It is, however, extremely doubtful whether our Courts will be inclined to carry the doctrine to such an extent. We must remember that their Lordships of the Privy Council in the case of *Raja Krishna Dutt Ram v. Raja Momtaz Ali*, (I. L. R., V Calc., 198), express themselves very cautiously, and, while acknowledging that the principle is, generally speaking, agreeable to general equity and good conscience, deny that the limits of its applicability are to be taken as rigidly defined by the course of English decisions. Those decisions are undoubtedly of great value in so far as they recognise the general equity of the principle and show the manner in which it has been applied by the English Court of Chancery, but they do not possess any inherent binding authority. To enforce the principle, however, against a purchaser from the mortgagor, and that, under the circumstances disclosed in the case of *Leigh v. Barnett* (19 Ch. D., 231), to which I have just referred, can scarcely be regarded as agreeable to general equity and good conscience.

There is a very great difference between the position of a purchaser of the mortgaged property and that of the mortgagor himself which should not be overlooked. Where a mortgagor makes an acquisition by purchase, it is no very great hardship to him to hold that it should enure for the benefit of the mortgagee; the mortgage being only a security for the debt due by the mortgagor. The question, however, generally arises in cases in which a third person has acquired an interest in the property under mortgage, and, if he happens to be a purchaser for value without notice, there would seem to be an equity in his favour, at least as strong as that in favour of the mortgagee. The mortgagee is preferred, and very properly, in respect of the property actually pledged to him, because his title is prior in point of time. This is an intelligible principle, but the same thing cannot be said of a doctrine which would force a purchaser of the equity of redemption to make a present to the mortgagee of any acquisition subsequently made by him with his own money.

There is, again, some difference between an acquisition made by the mortgagee and one made by the mortgagor—the position of the former being much stronger than that of the latter. If the mortgagee makes an acquisition by reason of any advantages possessed by him which would not be possessed by a stranger, or, if there are circumstances to show that the powers of the mortgagee were exerted to effect the purchase on favourable terms, the mortgagor will, no doubt, be entitled to treat such acquisitions as accretions to the mortgaged property, and, therefore, subject to redemption. But every purchase by a mortgagee cannot be taken to have been made for the benefit of the mortgagor. In the case of *Raja Krishen Dutt Ram v. Raja Mumtaz Ali* the judgment of the Judicial Committee was based on the peculiar circumstances of the case, and cannot, therefore, be accepted as laying down a rigid and inflexible rule. Indeed, their Lordships themselves say, in their judgment, that they are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms. “It may well be,” their Lordships add, “that when the estate mortgaged is a zemindari in Lower Bengal, out of which a patni tenure has been granted, or one within the ambit of which there is an ancient mokurari istimrari tenure, a mortgagee of the zemindari, though in possession, might purchase with his own funds, and keep alive, for his own benefit, that patni or mokurari. In such cases, the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may, therefore, be held entitled, equally with a stranger, to make it for his own benefit. In such cases, also, the patni, if the patnidar failed to fulfill his obligations, would not be resumable by the zemindar, and the zemindari would always have been held subject to the mokurari.” (*Raja Kishen Dutt Ram v. Raja Mumtaz Ali Khan*, I. L. R., V Calcutta, 204-205.)

It may perhaps occur to some of you that, the absence of a well-defined rule is likely to give rise to much unnecessary litigation, but it is not always easy, if indeed it is possible, to draw a sharp line of distinction. At all

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a mortga-
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having a
defective
title.

events it must be done, if it is to be done at all, by the Legislature, and cannot be effected by judges, who from the very nature of things are obliged to deal with isolated groups of facts.

I may here mention that a mortgagor having a defective title, is bound to make good his mortgage out of property subsequently acquired by him, and this upon a well-known principle applicable to mortgages as well as to other transactions ; thus, for instance, if a mortgagor having only a half-share in a certain property pretend to mortgage the whole of it, the mortgagee will have a right to insist upon a charge on the whole property, supposing the mortgagor afterwards by purchase or otherwise becomes the owner of the other half. The equity upon which the mortgagee relies, is that, whenever a mortgagor gets into his possession property which he has mortgaged to a third person, he is bound to hold that property subject to the mortgage originally created by him. In the language of the English law, the subsequently-acquired estate feeds the estoppel. Thus, in *Lootnarain Singh v. Showkhee Lall* (II Cal. L. Rep., 382.) A, holding a certain mehal as ghatwal, mortgaged it to B by way of a zarpeshgi lease for 21 years ; shortly after the granting of the lease, the zemindar got a decree against A, by which A's ghatwali right was extinguished. In execution of this decree the zemindar ousted and took khas possession of the mehal. Some years afterwards, the zemindar granted to A a perpetual mokurari lease of the same mehal : it was held in a suit against A, instituted by the assignee of B's rights in the zarpeshgi, that under sec. 18, Act I of 1877, A must, out of his present estate in the mehal, make good the zarpeshgi. (*Pranjivan Govardhan Das v. Bajju*, I. L. R., IV Bom., 34 ; *Deolie Chand v. Nirban Singh*, I. L. R., V Calc., 253 ; S. C., IV Calc., L. Rep., 150 ; *Lootnarain Singh v. Showkee Lall*, II Calc., L. Rep., 382 ; *Vishnu Trimbak v. Tatia*, I Bom. H. C. Rep., A. C. J., 22.)

Plea of
purchase
for value
without
notice.

This right, however, may be waived by the mortgagee, and cannot, it would seem, be enforced against a *bona-fide* purchaser for value, and without notice of the previous mortgage. For, strictly speaking, the right of the mortgagee is in the nature of a right to claim specific performance ; and to such a claim a plea of a purchase for value without notice would be a good defence. In *Ram Awtar Sing v. Tulsi Ram* (V Calc. L. Rep., 227), Government having,

under the Land Acquisition Act, taken possession of a portion of certain land which had been mortgaged by the owner, afterwards, while the mortgage was still in force, re-sold the portion taken to the mortgagor, who sold it to a third person *bond fide* for value. It was held, that the mortgage-claim could not be enforced against the purchaser, because he was a purchaser for value, without notice of the previous mortgage. (Cf. *Seva Ram v. Ali Bakhsh*, I. L. R., III All., 805, where the purchaser bought with notice.) I may mention in passing, that the Court expressed a doubt in the above case whether the lien would have attached, even if the property continued in the hands of the mortgagor, as the land was taken by Government free from the claim of the mortgagee, who could only claim a lien on the purchase-money.

A purchaser for value is always regarded with peculiar favour by the law. The recent judgment of the Master of the Rolls in *General Finance Mortgage and Discount Company v. Liberator Permanent Benefit Building Society* (10 Ch. D. 15) shows that the Court is always most reluctant to extend the doctrine of estoppel against a purchaser for value. It appears from the report that the mortgagor purported to grant a freehold estate to the plaintiffs in that case, by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid." The mortgage was accepted by the plaintiffs on the faith of certain forged title-deeds, which were produced and handed to him by the mortgagor. At the date of the mortgage, the mortgagor had not the legal estate nor indeed any interest whatever in the property which he purported to mortgage. Subsequently, however, the mortgagor acquired the legal estate and mortgaged it to the defendant. In an action brought by the plaintiffs to recover possession of the mortgaged property and also of the title-deeds, it was contended that the plaintiffs, by virtue of their mortgage and the subsequent acquisition of the legal estate by the mortgagor, were entitled to priority over the defendants, but the contention was overruled on the ground that the covenants in the mortgage-deed did not amount to a clear and distinct assertion that the grantor had the legal estate to grant. It is true that the case was decided on a highly technical point relating to the doctrine of estoppel, "an excellent and curious kind of learning," as Lord Coke says, but I refer to it as a

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Doctrine of
estoppel
against
purchase
for value.

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strong instance of the reluctance which the Court feels in enforcing the principle of estoppel as against a stranger who is innocent of fraud. In delivering the judgment of the Court, Sir George Jessel—after pointing out that it is a very unpleasant thing to have to decide a question without knowledge of the reasons for some of the distinctions established by the earlier authorities—goes on to say: “I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value, and there can be no reason—as I intimated at the beginning of my judgment—that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons claiming without value, the purchaser or the mortgagee can recover without any recourse to estoppel at all; therefore,—considering especially that the jurisdiction in equity and common law is now vested in every court of justice, so that no action for ejectment, or, as it is now called, an action for the recovery of land, can be defeated for want of the legal estate where the plaintiff has the title to the possession,—I think I ought not to attempt, in any way to extend the doctrine by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law—it appears no longer useful—and, in my opinion, should not be carried further than a judge is obliged to carry it” (10 Ch. D., 24-25) (*k*).

Frauds of
the mort-
gagor and
mortgagee.

I need scarcely point out that a mortgagee has a much stronger equity in cases of actual fraud by the mortgagor. Where, for instance, the assignee of a lease, subject to a mortgage, induced the landlord to take advantage of a forfeiture which the tenant committed expressly with that object, and afterwards took a new lease of the same property; the Court declared that the new lease was subject to the mortgage. (*Hughes v. Howard*, XXV Beav., 575.) On the other hand, the mortgagee will not be permitted to take advantage of his own fraud. Thus, for instance, in

(*k*) For a very learned discussion on the point, see Bigelow on Estoppels, pp. 348—381. The topic, however, is overlaid in the English law with much useless learning, owing to the ‘high and transcendental effect’ of an estoppel in the common law, on which a great deal of ingenuity seems to have been wasted. The conclusion arrived at by the learned author is that the after-acquired estate does not pass as against a purchaser without notice. But, the rule is subject to an exception in favour of a conveyance by a grantor having seisin (that is by disseisin) but no title. The exception, however, is based, not on general principles, but on certain peculiarities of English conveyancing.

this country, although the revenue laws make a clean sweep of all incumbrances when the property is sold for arrears of revenue, a mortgagee in possession who suffers the estate to fall into arrears cannot purchase it so as to acquire an irredeemable interest; and it will seem that the law is the same, whether the estate is allowed to fall into arrears properly or improperly. [*Raja Oojooderam Khan v. Aushootosh Dey*, Supreme Court, July 1852, reported in the *Englishman*, 8th July 1852; *Kelsall v. Freeman*, *Englishman*, 4th February 1854; *Nawab Sidhee Nuzar Ally Khan v. Rajah Ojoodhyaram Khan*, X Moore Ind. App., 540; S. C., V. Suth. W. R., P. C., 85; *Jagat Mohini Dassi v. Mussamat Sokeemoney Dassi*, XIV Moore Ind. App., 286 (Cf. p. 305); S. C., X Ben. L. Rep., 19 (Cf. p. 33). Cf. *Jayanti v. Yerubandi*, I. L. R., VII Mad., 111.] The same equity may be enforced against a third party if the sale is only a fictitious sale for arrears of revenue carried out in pursuance of an agreement between the mortgagee and such third party. (*Sreenath Ghosh v. Hurnath Dutt*, XVIII Suth. W. R., 240; *Nuzar Ally Khan v. Ojoodhyaram Khan*, X Moore Ind. App., 540; V Suth. W. R., P. C., 83.) If, however, the property is sold otherwise than through the default of the mortgagee, the charge will attach to the proceeds. (*Heeralall Chowdhry v. Janokeenath Mookerjee*, XVI Suth. W. R., 222.)

Upon a principle closely analogous to the doctrine of estoppel, it has been held in England that, where, upon a sale by a first mortgagee, the property is bought in by the mortgagor himself, the mortgagor acquires the estate subject to the second mortgage; although if the property is bought by a third party, he will take it free of all incumbrances. It is the duty of the mortgagor to pay off the first mortgagee and so discharge the estate for the benefit of the second mortgagee, and he cannot get rid of his obligation by purchasing from the first mortgagee instead of paying him off. (*Otter v. Vaux*, 2 K. and J., 650; 6 DeG. M. and G., 638; *Shamacharan Bhattachariya v. Anund Chunder Deo*, S. A., No. 1613 of 1879, unreported). A somewhat difficult question may arise if the mortgagor does not himself buy the property at the sale by the first mortgagee, but the property comes to him after passing through six or seven different hands. The point was mooted in the case of *Otter v. Vaux*, but was not decided by the Master of the Rolls. The question was also raised in this country in

Doctrine of
estoppel.

LECTURE the case of *Ram Atter Sing v. Toolsiram*, (V Cal. L. Rep.,
 III. 227), but was left undetermined by the Court.

Otter v.
Vaux.

The principle of *Otter v. Vaux* will not however apply in all cases. It is true that a subsequent mortgagee takes his security with the chance of the prior mortgagee being paid off without having recourse to the estate, and if therefore, the latter is paid by the mortgagor himself, there can be no question but that the puisne mortgagee gets the benefit of the payment and, ordinarily, it makes no difference if the payment is made by some stranger to the estate. But if the person who makes the payment does so under compulsion or for the protection of some interest of his own, such payment cannot, on principle, enure for the benefit of the puisne incumbrancer. A payment by the surety, for instance, would not accelerate the rights of a puisne mortgagee. The surety, on the discharge of the debt, would be entitled to the benefit of the security. Again it is sometimes said, that a prior mortgagee must account to subsequent mortgagees for all monies received in respect of his mortgage-debt. But the proposition is true only in a qualified sense, a prior mortgagee being bound only to account for such sums as are received either from the mortgagor or from the mortgaged property, but not for moneys received from other sources. (*Sawyer v. Goodwin*, 1 Ch. D., 351, where a dividend had been received out of the estate of the solicitor by the first mortgagee on the ground of the solicitor having invested the money on an improper mortgage-security.)

The English Courts have also refused to extend the principle of *Otter v. Vaux* to a case in which the prior mortgage was bought by a trustee in bankruptcy, for the benefit of the general creditors of the mortgagor. But in such case the trustee will not be in the same favourable position as a stranger buying in the prior security. His purchase will not indeed neutralise the first mortgage, but he may not, any more than the mortgagor himself, defeat the rights of a puisne incumbrancer (*Bell v. Sunderland Building Society*, 24 Ch. D., 618; cf. *Cracknall v. Janson*, 6 Ch. D., 735.)

To return: the right of the mortgagee will, however, not extend to what was never pledged to him, although it may be substituted in the place of the property originally pledged. Thus, to take a familiar instance from the Roman law, if a farm together with the slaves upon

it is pledged, and the slaves die and are replaced by others, the right of the creditor shall not extend to the latter, except, as I have already said, where they happen to be the offspring of the slaves who have died. (Cf. *Webster v. Power*, L. R., 2 P. C., 69.) This limitation of the right of the creditor, however, must not be confounded with cases in which the pledge is not actually destroyed, but only, to use the language of Sir James Colville, "assumes a new form."

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A question of considerable nicety on this point arose in the case of *Byjnath Lall v. Ramdin Chowdhry*, (XXI Suth. W. R., 233) which was heard in the last resort by the Lords of the Judicial Committee of the Privy Council. In the case before the Privy Council, which was heard on an appeal from a decree of the Calcutta High Court, the facts were somewhat peculiar. It seems that the mortgagor Gopalnarain Dass was, when he executed the deed of conditional sale which was the foundation of the plaintiff's title, the undisputed owner of an eight-anna undivided share in an estate consisting of three asli mouzas called Gunniporebija, Pemburinda and Tajpore Ruttompore, to each of which certain Dakhila villages were appurtenant. There was no partition or division among the shareholders, and the interest of the mortgagor, therefore, in the whole estate was an undivided moiety. In this state of things, Gopalnarain executed the mortgage, out of which the suit arose, of the whole and entire eight-anna of the whole sixteen annas of Mouzas Gunniporebija and Pemburinda, expressly excepting from the deed the eight annas of Tajpore Ruttompore. It should seem that, before the execution of the mortgage, application had been made by some of the co-sharers of the mortgagor for a partition of the estate under Regulation XIX of 1814. A partition was made by the Collector, and the result was that, instead of an undivided moiety of the whole estate, the whole of Mouza Pemburinda, the whole of Tajpore Ruttompore, and the whole of another mouza, a dependency of the third Mouza, Gunniporebija, were allotted to Gopalnarain, to be held by him in severalty. Shortly after the partition, Gopalnarain's rights and interests in the mouzas, which fell to his share, were sold at execution-sales, and purchased by certain persons, who were the substantial defendants in the suit, and who resisted the right of the mortgagee, to take anything under his mortgage-deed in excess of the eight-anna share of the mouzas which had

Rights of
mortgagor
and mort-
gagee when
pledge as-
sumes a
new form.

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Case.

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 been mortgaged to him, the mortgagee insisting upon his right to the whole sixteen annas of the mouzas which had fallen to the share of the mortgagor in lieu of the undivided moiety which was held by the mortgagor at the time of the execution of the mortgage. The Court of first instance gave judgment in favour of the plaintiff, proceeding upon the principle that the mortgagee was entitled to whatever was allotted to the mortgagor on the partition in lieu of his undivided eight-anna share in the mouzas Gunniporebija and Pemburinda, which was the subject of the mortgage. On appeal, however, to the High Court, the right of the mortgagee was limited to the share which was expressly named in, and covered by, the mortgage-deed, that is, only to an eight-anna of Mouza Pemburinda and an eight-anna share of Mouza Gunniporebija. The case then went on appeal to the Privy Council, and the Judicial Committee affirmed the decree of the first Court, and declared that the principle laid down by the first Court was correct. In giving the judgment of the Privy Council, Sir James Colvile is reported to have observed: "Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers, but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands? He would take the subject of the pledge in the new form which it had assumed. In the present case, there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made." (Cf. *Joala v. Hurbens*, N.-W. P., Vol. VIII, p. 659; *Boloram. v. Damoodur S. D. A.*, 1857, p. 359.)

In the case of *Mohindro Bhusan Biswas v. Shoshee Bhusan Biswas* (I. L. R., V Calc., 883), Mr. Justice Wilson refused to add the mortgagee of the plaintiff, in a suit for the partition of joint family-property, as a party, on the ground that the question as between plaintiff and defendant was, who was entitled to the property in dispute, and that, to determine that question, it was not necessary that the mortgagee should appear, as he would not be bound by any finding come to in his absence. But the learned Judge at the same time added that, in case of a decree for partition being made, the mortgagee should have leave to come in and attend the partition proceedings. It would appear that, in this case the legal estate was in the mortgagee, the mortgage being in the English form, but the learned Judge still refused to add the mortgagee as a party. (See also *Mohesh Chunder Chunder v. Hurrynath Cowar*, suit No. 460 of 1873, unreported. Distinguish *Kirty Chunder Mitter v. Anath Nath Dey*, I. L. R., X Calc., 97).

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III.Mortgagee
not a party
to a suit
for parti-
tion of
joint pro-
perty.

It is worthy of notice that the rights of the mortgagee are subject to a similar qualification in the Roman law as well as in the jurisprudence of countries whose systems have been built up on the basis of that law (l). Thus, it is stated, in Domat's Civil Law, § 1671, that "if an estate belong in common, without any division or partition to two or more persons, such as co-partners, co-heirs or others, and one of them has mortgaged to his creditor, either all his estate or the right which he had to that estate, this creditor will have his mortgage upon the undivided portion of his debtor as long as the estate shall remain in common. But after the partition, the right of his debtor being limited to the portion that has fallen to his lot, the mortgage of this creditor will be also limited to the same. For, although before the partition, the whole estate was subject to the mortgage for the undivided portion of this debtor, and though a right which is acquired cannot be diminished; yet, seeing the debtor had not a simple and immutable right of enjoying his share of the estate always undivided, but that his right implied the condition of a liberty to all the proprietors to come to a partition in order to assign to every one a portion that might be wholly and entirely their own, the mortgage, which was only an accessory to the debtor's right, implied likewise the same condition and affected only that which

Mortgage
of joint
family-
estate in
Roman
Law.

(l) As to the English Law on the point, see Walker on Partition, pp. 7-11.

LECTURE should fall to the debtor's share, the portion of the others
 III. remaining free of them. But if in the partition there was
 — any fraud committed, the creditor might procure a redress of
 what has been done to his prejudice."

It appears that the civilians were not insensible to the difficulty in which the mortgagee might be occasionally placed by a rigid adherence to this rule. Thus, to take the case, put by the writer from whom I have already quoted, of a partition of a succession consisting of moveable effects and of only a single parcel of land or tenement which it would be either impossible or very inconvenient to divide into shares, the creditors of the co-heir or co-executor, who should chance to have in his lot, either little or nothing at all of the lands and tenements, would find themselves disappointed in the hopes they may have entertained of having a mortgage upon the lands or tenements that made part of the succession. "But these creditors," says the author to whom I have referred, "ought to have a watchful eye before the partition, both over the moveables and immoveables, that nothing be done to their prejudice. For, if the partition were made without fraud, they might justly be told that their security was only upon what might fall to the share of the debtor; and if, for example, that debtor has wasted and dissipated the moveable effects which fell to his lot, it would not be just that the shares of the others should go to the payment of his debts. But, although the right of the mortgagee might, in certain cases, be affected by a partition, it could not be prejudiced by any exchange made by the debtor without his consent" (Domat's Civil Law, § 1668 Note R.) (*m*).

Mortgagee
 not the
 owner of
 the mort-
 gaged
 property.

It is, perhaps, unnecessary to state that as the mortgagee is not in any sense the owner of the property given to him in mortgage, the mortgagor will not be bound by a partition made by the mortgagee in his absence or by an exchange effected by the mortgagee without his concurrence, and it ought not to make any difference whether the mortgage is in one of the various forms known in this country or in the English form; but, it would be quite open to the mortgagor to seek to recover from the mortgagee, if he choose to do so, the property substituted by the action

(*m*) A question of some nicety may arise where a person having an undivided share in two estates, mortgages his share in one of them, and, afterwards on a partition, lands in the other estate only are allotted to the mortgagor. Cf. Jarman on Wills, Vol. I., p. 151.

of the mortgagee for that which was originally mortgaged to him. The judgment of the Allahabad High Court in *Nidhi Lall v. Muzahar Hossein* may, at first sight, seem to lay down a contrary proposition, but the facts were very peculiar, and I do not think that the learned Judges intended to deny the right of the mortgagor to follow the property which had, by the action of the mortgagee himself, been substituted for that which had been originally given in mortgage. (*Nidhi Lall v. Muzahar Hossein*, I. L. R., VII All., 436.)

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The question whether a mortgagee would be estopped by a previous judgment obtained against the mortgagor, subsequently to the execution of the mortgage, was raised in a recent case in the Calcutta High Court (*Bonomally Nag v. Koylash Chunder Dey*, I. L. R., IV Calc., 692). The learned Judges, while acknowledging that the question was not free from difficulty, refused to hold the mortgagee bound by the previous judgment.

Mortgagee
not estopped
by a
previous
judgment.

If the matter were *res integra*, the Court might not improbably have arrived at a different conclusion, but the question had already been decided in favour of the mortgagee in an earlier case (*Dooma Sahoo v. Joonarain Lall* XII Suth. W. R., 362), and the Court, without expressing any opinion of their own, simply followed that decision. I may, however, be permitted to observe that the point does not seem to have been seriously discussed in that case, and was pretty well taken for granted by the Court. (See also *Madhoo Proshaud v. Purshan Ram*, I. L. R., IV Calc., 520; *Tirbhobun Sing v. Jhono Lall*, XVIII Suth. W. R., 206.)

It appears from the report that in the case of *Bonomally Nag*, the mortgagee was not in possession, and had no knowledge of the previous suit, and these facts are, to a certain extent, relied upon by one of the learned Judges. It is, therefore, doubtful whether the Court intended to lay down any general proposition on the point, and there seems to be authority for the limitation suggested or rather implied in the judgment of one of the learned Judges. The rule on the subject is thus stated in Burge's Foreign and Colonial Law, Vol. III, pp. 220-221: "The mortgagee is not prejudiced by any recovery which a third person may have obtained against the mortgagor in a suit instituted subsequent to the mortgage. But it would be otherwise, if the mortgagee were, under his contract with the mortgagor, in possession of the property, and knowingly allowed the mortgagor to litigate with another

Bonomally
Nag's Case.

LECTURE III. his title to it, because, in that case, he had it in his power, by interposing his own prior claim and defending his own title, to have prevented such a recovery." (Cf. *Copis v. Middleton*, II Mad., 423.)

The only observation I wish to make on this passage is, that the author is here dealing only with actions of ejectment, and that it does not necessarily follow that a more stringent rule of estoppel may not regulate other classes of suits in which the person in possession, being also the apparent owner, may fairly be regarded as representing the rights of all parties interested in the estate.

Question of
estoppel.

The question has been discussed very elaborately in the recent case of *Sitaram v. Amir Begum* (I. L. R., VIII All., 324), and it is pointed out in the judgment that, after a mortgage has been duly created, the mortgagor in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive against, such mortgagee. It is also pointed out that section 13 of the Civil Procedure Code must be interpreted in the same way as if the words "on a title arising subsequently to the commencement of the first suit" had been inserted after the words "under whom they or any of them claim"—a point which, I may be permitted to observe, nobody ever thought of disputing.

Sitaram
v. Amir
Begum.

In delivering his judgment, Mr. Justice Mahmood said in reference to the difficulty felt by the Calcutta High Court in the case of *Bonomally Nag v. Koylash Chunder Dey* (I. L. R., IV Calc., 692) that he saw no ground for entertaining any doubt on the point, but, with great deference, it may be observed that the rule as to *res judicata* does operate, in many cases, where the party, who is sought to be estopped, does not, strictly speaking, claim under the person who was a party to the previous judgment, although in such cases the rule is for obvious reason subject to the qualification that the previous judgment was not recovered by fraud and collusion. If the question is considered with reference to general principles of law, it is, I venture to think, a mistake to suppose that none but the representative of the previous owner can be bound by the results of litigation and adverse decree against such owner. Lord Coke in speaking of estoppels says: "Privies in law—as the lord by escheat, tenant by courtesy, tenant in dower,

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the incumbent of a benefice, and others who come in by act of law in the *post* (*i. e.*, as successors to the property, including persons not claiming title under the preceding owner)—shall be bound by, and take advantage of, estoppels." (Coke upon Littleton, 352*a.*) The case of the reversioner under the Hindu law is another illustration of this principle, which is one founded on considerations of convenience, which after all must be the real test of the soundness of all general rules. It cannot, moreover, work any practical hardship by reason of the qualification with which it is guarded, *viz.*, that the previous judgment must have been obtained without fraud or collusion. It is to the interest of the State that there should be an end to litigation, but this object will hardly be accomplished, if any person, having any sort of interest in the property, however minute, were at liberty to re-agitate questions which have been already solemnly decided in the presence of the person who substantially represents the estate. (See the observations of Norman, J., in *Boylcunthnath Chatterjee v. Ameeroonissa Khatoon*, II Suth. W. R., 119; see also, *Tarapershad Mitter v. Ram Nursingh Mitter*, XIV Suth. W. R., 283.) It seems to me that the provisions of the Civil Procedure Code are somewhat defective, not in the direction suggested by Mr. Justice Mahmood, but because they do not deal with cases in which persons, although not formally parties to the action, were sufficiently represented by the party in the original suit. (*Ahmedbhoy v. Vulleebhoy*, I. L. R., VII Bom., 703, and the cases cited therein.) A Mitacshara father, for instance, represents the family in a suit regarding ancestral property with a third party, and, in the absence of fraud, an adverse judgment would bind the sons, although they do not claim under the father. So, also, a decree obtained against a mohunt or shevait will bind his successors, because he fully represents the estate for the purpose of litigation, although an alienation or incumbrance created by him would not be binding on the successor. (*Golap Chand Babu v. Prosonno Coomary Dabea*, XX Suth. W. R., 86; affirmed in appeal L. R., II Ind. App. 392.) A similar principle is recognised in Continental systems, where it seems that a judgment obtained against the owner of a restricted estate, will operate as an estoppel against the substituted heirs, and, according to the Scottish law, an action *bond fide* litigated by an heir of entail is *res judicata* in questions with succeeding heirs. A restricted

Mr. Justice
Mahmood's
judgment
considered.

LECTURE III. power of dealing with property, therefore, does not, as assumed by the Allahabad court, involve an incapacity to represent the estate and to bind others having an interest in such estate by the result of litigation conducted in good faith with a stranger. (See the observations of West, J., in *Radhabai v. Anantrao*, I. L. R., IX Bom., pp., 217—225). Indeed, it would be little short of disastrous if no person could acquire a safe title by *res judicata* if his opponent, the owner in possession, happened to create an interest—even though it might be of the most insignificant character—in favour of a third person, by way of mortgage, and of which the plaintiff might very well be ignorant; again—this would be still more startling—such person might be brought into the Court by the mortgagor as defendant, in which case he could not compel the mortgagee to join as plaintiff. It seems to me that a mortgagor may not unreasonably be taken to represent the estate for all practical purposes; as it is not at all likely that he would be so indifferent to his own interest as not to put his case properly before the Court. (See *Anachala v. The Zamindar of Sevagiri*, I. L. R., VII Mad., 328; also see the observations on p. 335.) It is suggested, in the judgment of Mr. Justice Mahmood, that the fact, that limitation which bars the mortgagor also bars the mortgagee, has nothing to do with the question of estoppel; but I venture to doubt whether this is really so. The two questions are intimately connected, as they both rest upon the supposed inability of a person, having a limited power of dealing with property, to allow, either by an adverse judgment or by adverse possession, a right to grow up in a third person which would destroy the rights of others interested in the property. (See the observations of West, J., in *Radhabai v. Anantra*, I. L. R., IX Bom., p. 255.)

Mortgagee when bound by the acts of the mortgagor.

But although a mortgagor does not represent the mortgagee so as to bind him by the result of an adverse litigation, he may, in certain circumstances, bind the mortgagee by his acts. An illustration of this principle is to be found in the case of *Lalla Mitterjeet Singh v. Raj Chunder Roy* (XV Suth. W. R., 448), where it was held that a mortgagee of a tenure was bound by an agreement to pay a higher rent entered into by the mortgagor in possession. Reliance seems to have been placed to a certain extent on the fact, that the landlord was ignorant of the mortgage, but it is not quite clear whether his knowledge would have

made any difference in the case. The interest of the mortgagee in the mortgaged premises cannot, however, be defeated by the fraudulent conduct of the mortgagor; and a mortgagee has been, therefore, allowed to enter a caveat against the grant of probate of a will, on the ground of the will being a forgery and a fraud upon the mortgagee, although the mortgagor, the heir-at-law, remained silent. (*Sarbomongala Dassi v. Shashibhoosun Biswas*, I. L. R., X Cal., 413.)

It has been held in England that a mortgagee will not be bound by a valuation or other proceedings taken under the Land Clauses Consolidation Act without his concurrence or service of notice of the proceedings on him (*Ranken v. East and West India Dock Co.*, XII Beav., 298). I am not aware of any Indian case on the point, but the mortgagee in this country may exercise by delegation the powers conferred by statute on the owner, the question in each case, however, depending partly upon the language of the instrument and partly upon the words of the statute. (*Saadat Ali v. Collector of Sarun*, 5 S.D.A. 1858, p. 840; *Bhawani v. Dalmardan*, I. L. R., III All., 144; *Vellaya v. Tirna*, I. L. R., V Mad., 76; *Narayana v. Makunda*, I. L. R., V Mad., 87.)

Rights of
the mort-
gagee.

Other cases may also occur in which the Court will interfere for the protection of the mortgagee. Thus for instance, in England the trustee in bankruptcy of a mortgagor, may be prevented from affecting the rights of the mortgagee of a lease-hold interest by disclaiming under the Bankruptcy Acts, although if the disclaimer be once executed the title of the lessor will be complete, and the rights of the mortgagee extinguished (*Buxton*, Exp. 15 Ch. D., 289; *Ditton*, Exp. 3 Ch. D., 459; *Sadler*, Exp. 19 Ch. D., 122). The mortgagee has similarly been allowed to restrain the trustees of a turnpike road from reducing the tolls which were the subject of the mortgage. (*Lord Crewe v. Edleston*, III Jur. N. S., 128, 1061; I DeG. and J., 93.) The mortgagee has a substantial interest in the pledge, and it has been held in England that he may, for the purpose of enforcing his security upon the interest of the mortgagor in an agreement, sue for the specific performance of the contract, if the mortgagor neglects to assert his rights (*Brown v. London Necropolis, &c., Co.*, VI Suth. W. R., 188.)

A mortgagee, where the mortgage deals with the whole interest of the mortgagor in the mortgaged premises, is entitled to the title-deeds, and it has been said that he is

Mortgagee
entitled to
dettain the
title-deeds.

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III.

Mortgagor
entitled to
inspect
them.

not bound to produce them or even his deed of mortgage until his claim is satisfied (*Beattie v. Jetha Dungarsi*, V Bom., H. C. Rep., O. C. J., 152) ; but this decision, which was based solely on the English law on the point, can hardly be regarded as satisfactory, it being, to say the least, open to considerable doubt (notwithstanding the dictum of Wigram V. C. in *Bentinck v. Willink*, II Hare, 1), how far the practice of the English Court was founded on principles of abstract justice. The law has now been altered in England by statute (See Conveyancing and Law of Property Act, 1881, c. 41, sec. 16), and the mortgagor is now entitled, *notwithstanding any stipulation to the contrary*, to inspect, at all reasonable times, the title-deeds in the custody or power of the mortgagee. The case in the Bombay High Court is an instance, and it is by no means a solitary one, of the influence exercised, not always beneficially, by the English law on the practice of our Courts. It is true that in the absence of any well defined rule, our Judges may very well borrow from the practice of the English Court of Chancery as successive generations of Equity Judges have borrowed, not unfrequently without any acknowledgment, from the Roman law, but an indiscriminate introduction of English law, although it might render the task of the Indian Judge comparatively less laborious, can scarcely be regarded with unalloyed complacency by suitors in this country.

The artificial character of the English law of mortgage is well illustrated by the position of a mortgagee of leasehold property. In England, if the whole term is mortgaged, the mortgagee may be sued on the covenants by the lessor, whether he does or does not enter into possession. (*Williams v. Bosanquet*, I Bro & Bing, 238 ; III Moore, 500.) Lord Mansfield, in one case, it is true, decided differently being of opinion that the Court must have regard to the real nature of the transaction, but his decision was shortly afterwards over-ruled by Lord Kenyon, that 'stickler for antiquity,' who thought that the precedent confused law and equity, and was, therefore, a dangerous innovation. But, happily in this country, we know of no distinction between law and equity.

Liability of
the mort-
gagee of a
leasehold
for rent.

But where the subject of mortgage is leasehold property and the mortgagee is put in possession of it under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent (*Kannye Lall Sett v. Nistoriny Dossee*,

I. L. R., X Cal., 443). The mortgagee may also make himself liable by having his name entered in the landlord's books as the tenant of the property. LECTURE III.

I will conclude by a few observations on the validity of a power of sale contained in a mofussil mortgage. The question appears to have been for the first time raised in the case of *Bhowani Churn Mitter v. Joykissen Mitter*, heard before the late Sudder Dewany Adawlut of Calcutta in the year 1842, when the Judges were unanimously of opinion that a sale by the mortgagee under the power did not pass a valid title to the purchaser. Power of sale in the mofussil.

The decision has been criticised by Mr. Justice Macpherson in his work on Mortgages (pp. 139—148), and there is no doubt that some of the reasons given by the learned Judges will not bear examination. But the judgment of the Court substantially rests upon the broad ground that it would be inexpedient to allow the mortgagee in this country to exercise the power. It is true that such a power has been found beneficial in England, but English mortgagors, as a class, are perfectly competent to take care of their own interests. In India, however, we have to deal with a very different order of men. The mass of mortgages in this country consists of mortgages of ancestral fields by ignorant peasants to a class of people not remarkable for their scrupulousness, and any one having experience of Indian litigation, must admit the danger of arming our money-lenders with the right to sell the properties pledged to them without the intervention of a Court of Justice. As observed by the Court in *Bhowani Churn Mitter v. Joykissen Mitter*: "This Court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell his debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee, or some of his connexions even (as in this case it is alleged the purchaser is the son-in-law of the mortgagee) at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale." (VII Macnaghten's Sel. Rep., 429.) Validity of power of sale discussed.

With reference to the argument that the exercise of the power of sale was not unfair to the debtor, the learned

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III.Bhowani
Churn
Mitter's
Case.

Judges observed: "It is urged for the plaintiff that the public sale of the mortgagor's property cannot be a disadvantageous mode of proceeding towards the latter; that his property is sold to the highest bidder; and that, if a surplus remains, it belongs to himself. We have not to deal with abstract theories or bare possibilities, but with what experience and the principles of the Regulations furnish us as our guides in the determination of a novel and unprecedented case. In a case of execution of a decree of Court, the proclamation of sale is an invitation to others interested to come and state their claims. If no claim is preferred, the title of the purchaser may generally be considered a pretty fair one. If claims are preferred, they are summarily investigated, and, should they appear fraudulent, are rejected; and, in this case, too, the purchaser may generally be considered in a good position, as few are willing to incur the expense of a regular action on grounds already declared by a Court of Justice to be *prima facie* fraudulent. And yet, with all the formalities and securities of a transfer of real property by sale made by a Court of Justice, how frequent are the complaints that the property has been sold at an inadequate price, how much more frequent would they be, had not this Court held that inadequacy of price, at a regularly conducted sale, forms no ground for its reversal! If such be the case in such sales, the evils to be apprehended from permitting private individuals to sell their debtor's property, in satisfaction of their claims, must be ten-fold. But few purchasers at a fair price will be found, when, in all probability, a law-suit (as the order granting the review expresses it) will be tacked to the purchase. The object of the Regulation is to prevent improvident and injurious transfers of landed property at an inadequate price; the result of such a practice as that which the contract before us involves would be to render them universal." (VII, Macnaghten's Sel. Rep., pp. 440-441.)

Sale under
mortgage
ought to
be con-
ducted by
Court.

It is true that the utmost latitude ought to be given to the parties to contract in any manner they please, but freedom of contract wears a very different aspect according as it is allowed to the English landowner or the Indian peasant, and I am fortified in my view by the recommendation of the Indian Law Commissioners, who propose, in their Sixth Report, that a sale under a mortgage should in every case be conducted by the Court. (See also the

observations of Melvill, J., in *Kesub Rao v. Bhowaneejee*, LECTURE VIII, Bom. H. C. Rep., A. C. J., 142.) III.

We have already seen that in most continental systems, a sale without judicial process, is absolutely void. Article 2078 of the French Code says: "The creditor cannot in default of payment dispose of the pledge, saving to him the power of procuring an order of the Court that such pledge shall continue with him in payment, and up to its due amount according to an estimate made by competent persons, or that it shall be sold by auction." Power of sale not allowed in the French code.

"Every clause which shall authorise the creditor to appropriate the pledge to himself, or to dispose thereof without the above-mentioned formalities, is void."

You will remember that the French Code, equally with the other systems of law on the Continent, has been largely shaped by the Roman law, and if the power which the Roman pledgee possessed has not been retained in those systems, it may fairly be presumed that the exercise of the power is not suited to every condition of society. But for the peculiar economic conditions under which land is owned in England, it may, indeed, fairly be doubted whether the system would have worked well even in that country. Be that, however, as it may, there can be no doubt that it would be dangerous to trust the Indian money-lender with a power which is so much liable to abuse (*k*).

(*k*) My attention was called since the delivery of these lectures to an unreported judgment of Bayley and Hobhouse, JJ., which was printed in the Appendix, in the first edition of this book. The learned Judges in that case refused to follow the law laid down by the *Sudder Dewany Adawlut* in *Bhowani Churn Mitter's Case*. The question has also been since discussed in two cases in the Bombay High Court, in both of which the Court upheld the validity of the power; but I do not think that any general rule can be extracted from either of these cases. In the first case, *Petamber v. Vanumali*, (I. L. R., II Bom., 1), the mortgage was in the English form, and the mortgagees were a joint-stock company having their head office in London, and the Court in upholding the validity of the power relied upon both these circumstances. In the other case *Jaggivan v. Shridhar*, (I. L. R., II Bom., 252), the Court expressly upheld the validity of the power on the ground that, although the land was outside the Island of Bombay, both the parties to the transaction were residents of that city, and that, the mortgage being in the English form, the parties must be taken to have contracted with reference to the English law on the principle laid down by the Supreme Court of Calcutta in the case of *Bholanath Kundu Chowdhry v. Aunnoda Prosad Roy*, (I Boul., 97). I may also mention that in *Bhannumotee v. Premchand*, (XV Ben. L. Rep., 28), Mr. Justice Jackson seems to have expressed a doubt as to the soundness of the decision of the *Sudder Dewany Adawlut* in *Bhowani Churn Mitter's case*. But it was not found necessary to decide the question. The matter, however, has now been set at rest by Sec. 69 of the Transfer of Property Act.

LECTURE IV.

WHAT constitutes simple mortgage—Simple mortgage an equitable lien, and really comprises two transactions—Questions of construction—*Miller v. Ranga Nath*—Personal liability of the mortgagor—*Noratam v. Sheo Perqush*—No particular form of words necessary to constitute simple mortgage—Intention of the parties—Cases on the point—Power of sale—Nature of security possessed by simple mortgagee—Simple mortgage how made available—Agreement as to rate of interest—Nature of decree for sale—Mortgage decree—Right of mortgagee to sue—Period of grace allowed by some courts to mortgagor—Rights of a purchaser under a decree not for sale—Conflicting views of the Allahabad and Madras, and the Calcutta and Bombay High Courts—What passes in a sale under a money-decree—Doctrine of merger as explained in *Venakata v. Ramiah*—Difference between money-decree and decree for specific enforcement of lien—Rights of puisne incumbrancers—Cases on the point—Case of more than one incumbrancer—Law of Procedure—Knowledge of subsequent incumbrances not essential—Who ought to be made parties to the suit; case of mortgagor, owner of equity of redemption, person with contingent interest, execution-purchaser and Mitakshara father—Doctrine of virtual representation—Cases on the point—Rights of an absent transferee of equity of redemption—*Gopibundhoo v. Kalipodo*—Sale by puisne incumbrancer—Rights of the first buyer of the equity of redemption—*Bajinath v. Gobardhan*—Right of redemption of an absent interested party—Account of mortgage debt—Practice of mofussil courts—Mortgagee not entitled to sell equity of redemption under money-decree—Right of transferee to redeem purchaser—Cases on the point—Mortgagee sells the property discharged of his own lien—Nature of a simple mortgage—Purchase by mortgagee—Criticism of Bombay cases on the point—Law of execution—Practice of Continental courts—Right passing under a sale—Relation of second to subsequent mortgages—Effect of clause against alienation in mortgage deed—Breach of such a clause valid to what extent—Roman law on the point—*Lis Pendens*—Provisions of the Procedure Code—Right of prior mortgagee to sue for re-sale of property—Mortgagee not bound to proceed against pledge—Relative rights of the parties—Practice of the Court of Chancery—Exceptional cases—Case of portion of mortgaged premises converted into money—Joint mortgage by two or more mortgagors—English law on the point—Right of one of several mortgagees to sue—Suit for foreclosure—Mortgagee free to proceed against any property to what extent—Limitation of this right—Section 271 of Act VIII of 1859—Mortgagee may waive his rights—*Fakir Bux's case*—Decree upon a simple mortgage a decree for money—Right of court to restrain mortgagee in case of collusion—Section 287 of the Civil Procedure Code—Section 295 how construed—Remedies of mortgagor—Sale of property “subject to mortgage”—Section 271 of Act VIII of 1859—Defence of *bona fide* purchaser for value without notice not available—Roman law on the subject—Cases on the point—Right of simple mortgagee a real right—Statutes of limitation—Period within which security must be enforced—Court in which mortgagee must sue—Conflicting decisions—Question of pecuniary jurisdiction.

A SIMPLE mortgage is a mortgage in which the land is pledged as a collateral security, the right of the creditor, in default of payment, being limited to a sale by judicial process of the land hypothecated to him. In this kind

of mortgage the personal liability of the mortgagor is not excluded. It corresponds to the hypothecation of the Civil Law and the systems which are founded upon it. In a pure simple mortgage the mortgagor is not put into possession of the property pledged to him. He has not, therefore, the right to satisfy the debt out of the rents and profits, nor can he acquire the absolute ownership of the estate by foreclosure.

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IV.

What constitutes simple mortgage.

To borrow the language of English law, a simple mortgage is in the nature of an 'equitable lien.' It does not vest any 'estate' in the mortgagee, but only creates a lien as incident to the debt (*Nadir Hossein v. Boboo Pearoo*, XIX Suth. W. R., 255; cf. 259). Notwithstanding the hypothecation, the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the conditions of the mortgage. But subject to the charge created by the mortgage, he may alienate his property either by gift, sale, by a second mortgage, or otherwise. (Per Turner, J., in *Akhe Ram v. Nand Kishore*, I. L. R., I All., 236; cf. 244.)

Simple mortgage an equitable lien.

A simple mortgagee in this country is not entitled to appear at a revenue-settlement either as a claimant or otherwise, nor can he sue for a partition (*Sheik Torabali v. Khoda Buksh*, N.-W. P., 1853, p. 489; *Kussoo Beg v. Thakoor Bhowanee Singh*, N.-W. P., 1855, p. 453). A simple mortgage, strictly speaking, consists of two parts,—a covenant on the part of the mortgagor to pay the debt and an agreement empowering the mortgagee to realize his money out of the property pledged as a collateral security. The pledge, however, does not directly confer on the mortgagee the power of sale. He must obtain a decree directing a sale in order to make his security available for the purpose of discharging the mortgage-debt. In the case of a simple mortgage, therefore, the mortgagee has, generally speaking, on the default of the debtor, a two-fold cause of action,—the one arising out of the breach of the covenant to repay, and the other arising out of the hypothecation. He is at liberty to sue the mortgagor on both the causes of action in one suit at once, or he may pursue the one remedy at one time, and the other at another (a). If the mortgagee sues

(a) His right to do so is, however, subject to the provisions of sec. 43 of the Civil Procedure Code, the effect of which will be discussed later on; Cf. sec. 99 of the Transfer of Property Act.

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IV.

on the covenant only, he obtains what is known as a money-decree; if he sues on the contract of hypothecation only, he obtains merely an order for the sale of the property pledged to him. But if, as is generally the case, he sues on both the causes of action, he obtains a decree for the money, with a declaration that he is entitled to have it satisfied by the sale of the land.

Really
comprises
two trans-
actions.

A simple mortgage, therefore, in reality comprises two transactions, which are distinct from one another. It imposes a personal liability for the debt on the obligor, while it effects, at the same time, a mortgage of the debtor's property, thus creating a personal as divisible from a property obligation, the loan being separable from the hypothecation. This distinction is clearly pointed out in those cases, in which questions have been raised as to the right of a simple mortgagee to bring an action for debt where the instrument of mortgage was inadmissible in evidence under the Registration Act as embodying a transaction affecting land. (*Luchmeput Singh Dugor v. Mirza Kharial Ali*, IV Ben. L. Rep., F. B., 18; *Vallaya Padayachy v. Moorthy Padayachy*, IV Mad., H. C. Rep., 174; *Tukoram Vithoji v. Khandoji Malhorji*, VI Bom., H. C. Rep., O. C., 134; *Sangappahin Nangappa v. Basappa Bin Parrappa*, VII Bom., H. C. Rep., A. C., 1; *Raja Balu v. Krishnarao Ramchandra*, I. L. R., II Bom., 273; *Krishtolal Ghose v. Bonomali Roy*, I. L. R., VI Cal., 611; *Sheo Dial v. Prag Dat Misser*, I. L. R., III All., 229; *Ulfatunessa Allahijan v. Hossain Khan*, I. L. R., IX Cal., 520; in the last case, however, the decision turned upon a somewhat different point.)

Questions
of con-
struction.

But the transaction may not always be divisible, and difficult questions of construction often arise owing to the loose manner in which mortgages are drawn up in this country. Legal experts are very seldom employed in India, and the most important documents are prepared by persons of little education and with as much knowledge of the law as the traditional village schoolmaster of the English bar. The consequence of this state of things is, that a great deal of most expensive litigation arises out of questions of construction of extremely ill-drawn deeds, which could have been easily avoided by the employment of experts to make them. This is well illustrated in some recent cases to which I will ask your attention. In the case of *Mutungini Dassee v.*

Ramnarayan Sadkhan, (II Cal. L. Rep., 428), the mortgage-bond, after setting out a list of properties belonging to the defendant, proceeded as follows: "I borrow the sum of Rs. 100 from you on mortgage thereof (of the land before mentioned) with interest at the rate of 24 per cent. per annum, which interest I shall pay monthly, and shall repay the whole amount within the 23rd of Chytr of this year (April 5th, 1875). In default of my paying the debt within the term aforesaid, you shall have to get the mortgaged property sold by instituting legal proceedings. Should the sale thereof not cover the whole amount, you shall have to realize the balance by having my other landed properties disposed of. On the above condition I do hereby execute this mortgage-deed, having mortgaged the above piece of land, together with the title-deeds thereof." The Court held that the document was not divisible, as it disclosed only one transaction, and was therefore not admissible in evidence even in an action only for the money secured by the mortgage. The learned judges also expressed a very serious doubt whether having regard to the terms of the loan, the defendant was at all personally liable for the money, and whether the only remedy of the plaintiff was not against the mortgaged property. At any rate, the personal liability which was to arise only in the event of there being any balance after the sale of the mortgaged properties could not be dissociated from the hypothecation. (See also *Jogeswar v. Nitai-chand*, IV Ben. L. Rep., App. 48, where a decree was given only against the defendant's movable property. But see *Umasundari v. Uma*, VI Ben. L. Rep., App. 117.)

The recent case of *Miller v. Ranga Nath Mowluk*, (I. L. R., XII Cal., 389) also furnishes another instance of the embarrassments which arise when you have to deal with badly-drawn instruments. In that case the mortgage-bond provided as follows: "If the executants thereof fail to pay the money, according to the terms thereof, the creditor shall immediately institute a suit and realize the debt by the sale of the mortgaged property; and that if the proceeds of the sale fall short, from the personal and other properties of the mortgagors." It was contended—and the contention undoubtedly received some colour from the language of the instrument—that no action could be brought to make the mortgagor personally liable till a suit had been brought on the mortgage, and an endeavour

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Ranga
Nath.

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made to realise the debt by the sale of the property pledged to the creditor, but the Court was of opinion that the contention was not well-founded, the bond providing, however inartificially, for two remedies by means of one and the same suit, although both the remedies were not to be simultaneously available—the personal remedy against the mortgagors being available only in the event of the first remedy against the mortgaged property being found insufficient.

I have said that a simple mortgage does not, as a rule, exclude the personal liability of the mortgagor; whether it does so or not in any particular case must depend on the terms of the document, and if the language employed in it is such as to create only a hypothecation, the mortgagee will not be entitled to sue the mortgagor personally for the debt.

Personal
liability of
the mort-
gagor.

In the case of *Noratum Das v. Sheo Perqush Singh*, (I. L. R., X Cal., 740), their Lordships of the Privy Council were called upon to construe a document which commenced by stating that the mortgagor had borrowed the sum of Rs. 4,100 at a certain rate of interest. It then went on to say: "I have by this instrument hypothecated the whole of my property in Taluk Chandipore, situate in Fyzabad. As the aforesaid Taluk of Chandipore Birhar is under management under the Encumbered Estates Act, and I have already filed in the office of the Superintendent a schedule of my debts specifying the names of my creditors, I do hereby promise and give it in writing that I shall without any plea repay the principal, with interest, within the term of two years. The mode of payment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest. I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate, without paying up the present debt with interest; if I do take the profits, it will be for the payment of this debt. I shall, until this debt is repaid, abstain from contracting other debts from the bank or anywhere else. When my estate is released from management under the Encumbered Estates Act, I will immediately, first of all, pay the debt due to the said banker, and will pay the other creditors afterwards. In both cases—that is, while the estate is under management and after it is released—the repayment of this debt will be the subject of my first consideration. In the event of any

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qush.

breach of contract taking place on my part, the said banker is at liberty to institute a suit within the time fixed in this bond and recover the money. I will not transfer or mortgage to any one the hypothecated property till the principal and interest of this debt is paid up; if I do so it will be illegal. These few lines have, therefore, been written as an unconditional bond hypothecating my property, so that it may serve as a document, and be of use when required."

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IV.

It was contended on behalf of the mortgagee that the instrument contained a promise to pay distinct from the hypothecation, and that an action could, therefore, be maintained to make the mortgagor personally liable for the debt; but their Lordships were of opinion that, looking at the whole of the deed, they could not place any other interpretation upon it than that it was a mere hypothecation of the taluk and nothing more.

No particular form of words is necessary to constitute a simple mortgage. But it must contain, either expressly or by implication, a right to convert the security into money, without which the transaction, whatever else it may be, cannot certainly be called a simple mortgage. Difficulties, however, as I have already had occasion to observe, not unfrequently arise owing to the extremely inartificial language of Indian instruments. In the case of *Gunga Persad Singh v. Lalla Behary Lall*, (S. D. A., 1857, p. 825), in which the question arose whether a bare covenant by the debtor not to alienate his property till the debt was repaid, constituted a simple mortgage so as to confer a real right on the creditor, the Court observed: "As a general rule, we adhere to the principle laid down in the case of *Chunder Kishore Surma* (9th July, 1855), that the title of a person who purchases in good faith is not vitiated by any contract into which the vendor may have previously entered with a stranger binding himself not to alienate his property. If a party is desirous of obtaining a valid lien on any particular property, he should adopt the simple means which the various kinds of mortgage in use in this country afford. If he does not choose to do so, the fault is his own, and the innocent purchaser should not be made to pay the penalty of his negligence." (b)

What constitutes simple mortgage.

(b) It must be observed that this is a different question from that of the validity of a mortgage in which no specific property is pledged. To constitute a mortgage there must be *operative words* in addition to a specific description of the property.

LECTURE
IV.Intention
of the
parties.

It may, no doubt, be said that such a doctrine would very frequently defeat the intentions of the parties; but the rule of construction founded on the presumed intention of the parties, unless carefully fenced in, is calculated to introduce the very greatest confusion. It would carry me much beyond the limits of the present lecture to examine the various aspects of this doctrine, and there are, probably, many among you who are familiar with the controversies on the point in some famous writings, both ethical and juridical. The rule, however, has an undoubted air of plausibility, and the fallacy which lurks in it is betrayed only on careful examination. It is true that if the intention can be collected from the instrument, the form of expression is not material. But the real difficulty lies in collecting the intention when it is not formulated in apt words.

Agra cases
on the
point.

In the Reports of the Agra High Court you will find two cases, in one of which the Court thought that the debtor intended to create a mortgage, while in the other, it was held that there was nothing to show any such intention. The language of the two instruments, however, so far as can be gathered from the report, was almost precisely the same, the debtors covenanting with their creditors in both the cases not to alienate their properties till the debts due to the creditors should have been repaid. (*Chunney Lall v. Pallowun Sing*, IV Agra H. C. Rep., 217; *Martin v. Purrisram*, II Agra H. C. Rep., 124. See also *Bolakeelal v. Bungsee Singh*, VII Suth. W. R., 309; *Ram Gopal v. Ram Dutt*, XII Suth. W. R., F. B., 82; cf. VII N.-W. P., 124; VIII N.-W. P. 669.) The caustic observations of Fearne on *Perrin v. Blake*, will suggest themselves to every one familiar with the writings of that accomplished lawyer. I should mention that according to some recent authorities, to constitute a simple mortgage, the power of sale conferred by it should be one capable of being exercised without the intervention of a Court of Justice. A document is not, it has been said, necessarily a mortgage simply because it is so styled, nor is a recital that the land "stands security" for the money borrowed, sufficient to create a mortgage. The property, too, may be spoken of as mortgaged; but even then the transaction might not be a mortgage. In such cases the creditor would have only a charge upon the property within the meaning of section 100 of the Transfer of Property Act. He would have the

Bombay
case.

right, it is true, to have his charge realized by sale under a decree, but he would not be a mortgagee, no power being given to him, either expressly or by implication, to sell the property out of Court. Until, therefore, he obtains a decree against the land, no interest in it is transferred to him such as is transferred by a power of sale in an ordinary mortgage. (*Khemgi v. Rama*, I. L. R., X Bom., 519. Cf. *Gopal Pandey v. Parsotum Dass*, I. L. R., V All., 121. But see *Sheoratan v. Mahipal*, I. L. R., VII All., 258, F. B.; *Bishen Doyal v. Udit Narayan*, I. L. R., VIII All., 486; *Govind v. Kalnack*, I. L. R., X Bom., 592.)

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IV.

I am, however, bound to say that very few mortgages, if any, at least in this part of the country, confer a power of sale without the intervention of a Court of Justice. Indeed, as the law stood before the passing of the Transfer of Property Act, such a power was of very doubtful validity in cases not governed by the English law, and now by Statute the power is, as a rule, incapable of being exercised in the mofussil. If, therefore, the broad rule laid down by the Bombay High Court is accepted as law, documents which we have been hitherto in the habit of regarding as simple mortgages, must no longer be viewed in that light, but should be treated as creating only charges upon land. I may also mention that a power of sale, even under an order of Court, is not always expressly given in mortgage-deeds, and has, in many cases, to be inferred from the language of the document. But a power of sale without the intervention of a Court of Justice is, as might be expected, seldom, if ever, given by a mofussil mortgage. The question in the Bombay High Court as to what constitutes a mortgage, as distinguished from a charge, arose, however, upon the construction of Article 132 of the Limitation Act; but it does not follow that the distinction, if well founded for the one purpose, must be equally well founded for other purposes (c).

I will now proceed to discuss the rights of the mortgagee under a simple mortgage. We have seen that he has no right to enter upon possession of the property mortgaged to him, or to foreclose the mortgagor's equity of redemption, and that the only mode in which he can avail himself of his security is by a sale, through judicial process, of the property pledged to him under a decree of

Nature of
security
possessed
by simple
mortgagee.

(c) See the notes to clause (b), sec. 58 of the Transfer of Property Act.

LECTURE Court, the mortgagee having, by virtue of the mortgage, a
IV. preferential right to be paid out of the purchase-money.

Simple
mortgage
how made
available.

According to the usual practice of the mofussil Courts, the mortgagee asks by his plaint for the sale of the mortgaged property, and, if he succeeds, he obtains a decree for the money due to him, with a declaration that the mortgaged property should be sold for the realization of the money. It seems that in taking the account, the Court is not bound in a suit upon a mortgage to allow the plaintiff interest at the rate agreed upon between the parties after the institution of the suit; the rate of interest after the institution of the suit being in the discretion of the Court (*Mangniram Marwari v. Dowlut Roy*, I. L. R., XII Cal., 569, F. B.; but see *Ord v. Skinner*, L. R., VII, I. A., 196; S.C., I. L. R., III All., 91; *Bandaru v. Atchayamma*, I. L. R., III Mad., 125; *Dhunput Singh v. Golam Hadi*, Coryton's Rep., 12; S.C., II Hyde, 106. See also the cases collected in a note to page 188 of Belchambers' Practice of the Civil Courts). The Court, however, is bound to allow interest at the contract rate down to the institution of the suit (d).

Agreement
as to rate
of interest.

The above observations apply to cases in which, as is generally the case, interest at the rate agreed upon is payable by the terms of the bond down to the date of the realization of the money by the mortgagee. Where, however, there is no express agreement as to the rate of interest payable after the debt becomes due, interest as such may not be claimed by the mortgagee after due date; although compensation may be awarded for the use of the money *post diem*, which may be, but is not necessarily, regulated by the rate specified in the deed of mortgage. (*Dickenson v. Harrison*, IV Price, 282; *Atkinson v. Jones*, II A. and E., 439; *Price v. G. W. Ry. Co.*, XVI M. and W., 244; *Cooke v. Fowler*, L. R., VII H. L., 27.) Cases also may arise in which the Court may refuse to give the mortgagee any interest as damages, except, perhaps, a nominal amount. But the circumstances which would justify such a course must be of a very exceptional character, as, for example, where the interest which the mortgagor contracted to pay was exorbitant or extor-

(d) On the Original Side of the High Court, however, the practice of the English Courts, now embodied in section 86 of the Transfer of Property Act, has always been followed, and interest is allowed at the rate specified in the mortgage down to date of decree.

tionate. The question whether the mortgagee has been guilty of unnecessary delay in bringing his action may also be fairly taken into account in determining the amount of damages or compensation to which he may be entitled. But no rigid or inflexible rule can be laid down as to the standard by which the damages should be measured, and the decision of the question must turn in a great measure upon the special circumstances of each case (*Bishen Dyal v. Udit Narayan*, I. L. R., VIII All., 486; *Juala Prosad v. Khumur Sing*, I. L. R., II All., 617).

I have said that a mortgage decree should always direct a sale of the mortgaged property. Difficulties, however, occasionally arise from inartificially drawn decrees which are well illustrated in some recent cases, in which the question arose whether a decree obtained by a mortgagee should be regarded as a mere money-decree or as a mortgage-decree. (See *Harsukh v. Meghraj*, I. L. R., II All., 345; *Janki Prasad v. Baldeo Narain*, I. L. R., III All., 216, F. B.; *Debi Charan v. Parbhu Din Ram*, I. L. R., III All., 388, F. B.; *Bir Chunder v. Afsarooddeen*, I. L. R., X Cal., 299.) It would serve no useful purpose to go through all the various cases on the point which are not always easy to reconcile. Indeed, as the construction of a document must vary according to the varying terms employed in framing it, it would be difficult, if not impossible, to lay down any well-defined rules. The cases, however, may be useful as showing the spirit in which our Courts are in the habit of reading decrees seldom very artistically drawn, and not unfrequently absolutely unintelligible. The leaning of the Court, however, at least in the later cases, seems to be in favour of a liberal construction.

The expression 'mortgage-decree' which is used in the mofussil Courts in contradistinction to a 'money-decree,' generally means a decree for money as in an ordinary action of debt, coupled with an order directing a sale of the mortgaged property in satisfaction of the judgment-debt. It may, however, in exceptional cases, mean a decree for money to be realized in a particular manner, that is, by a sale of the mortgaged property, and not otherwise. (*Solano v. Moran*, IV Cal. L. Rep., 11; *Budun v. Ram*, I. L. R., XI Bom., 537.) A decree on a mortgage-bond ought, however, to be so drawn up as not to restrict the creditor only to proceedings *in rem*, that is, to proceedings taken with the object of selling the pledge. Decrees on

LECTURE mortgage-bonds are also sometimes drawn up with a provision that the pledged property should be sold first; the general property of the debtor being liable to be seized only in the event of a deficiency. It is to be regretted that there is no prescribed form, as the language of the decree regulates the mode of execution and often gives rise, as we shall presently see, to considerable embarrassment; in some cases, however, the difficulty cannot be avoided by the Court as the language of the decree must follow the terms of the bond, and it is no exaggeration to say that no two bonds in this country are worded alike.

Right of
mortgagee
to sue.

The mortgagee may bring his suit at any time after default has been made by the debtor; he may also sue for any interest which may have fallen due without suing for the principal, if, under the terms of his mortgage, he is not entitled to call in the principal money, although such a course is sometimes liable to be regarded as oppressive, and the mortgagee, if he should sell the mortgaged property under a decree for the interest only, might find himself in an embarrassing position when seeking to recover the principal. But if the payment of the principal is not deferred for any specified time, or in other words, if the principal is payable on demand, a suit should not be brought only for the interest, but for an account and payment of what remains due on the mortgage for principal and interest up to the filing of the plaint (*Annapa v. Ganpate*, I. L. R., V Bom., 181).

Period of
grace.

I may mention that in some Courts a period of six months is usually allowed to the mortgagor to pay the money found due to the mortgagee on his security. This indulgence, however, which seems to be borrowed from the practice of the English Court of Chancery, is not allowed to the mortgagor everywhere, and the propriety of extending it to a decree for sale is, perhaps, open to question, such a decree standing upon a very different footing from a decree for foreclosure (*e*). Even in England an immediate decree for sale is not unfrequently made by the Court. The question, however, is not of much practical importance, and I have referred to it only to show how very largely, even in details, our law of mortgage has been shaped by the practice of the English Courts of Equity.

Rights of
a purchaser

It used to be thought at one time that a purchaser under a decree on a mortgage which did not direct a sale, acquired

(*e*) See, however, sec. 88 of the Transfer of Property Act.

no higher rights than a purchaser under an ordinary execution. And this view, although now negatived by the Calcutta as well as the Bombay High Courts, is still adhered to by the Allahabad and, to a certain extent, by the Madras High Courts. In support of the proposition that a sale under a money-decree passes to the purchaser only the rights and interests of the debtor as they stand at the date of the execution-sale, or, more properly speaking, at the date of the attachment which precedes the sale, it is said that there is a considerable difference between a suit to enforce the contract of hypothecation and an action merely on the covenant. A suit to enforce a pledge of land must be brought in the Court within the local limits of which the property is situated, and to such a suit all persons interested in the equity of redemption must be made parties. But an action on the covenant only may be brought in the district in which the defendant resides, and in such an action only the mortgagor is a proper party. The mortgagee has, besides, a right to elect the form in which he should proceed; and if he does not choose to avail himself of the collateral security, the execution-purchaser ought not to be allowed to take advantage of it. The lien can pass by the sale and be used by the purchaser for his protection only when the mortgagor elects to avail himself of it and takes the steps which are necessary to entitle him to enforce his pledge (*Khub Chand v. Kalian Das*, I. L. R., I All., 240, F. B.). It has also been suggested that where the mortgagee brings his action only on the covenant, and gets a money-decree, the mortgagor's original obligation is gone *transit in rem judicatum*. A new obligation arises by virtue of the judgment and decree, namely, an obligation to satisfy the decree which has been passed in favour of the creditor, and the mode in which this obligation can be enforced is pointed out by the Code of Civil Procedure. The lien which was incident to the original debt is extinguished with the conversion of the original obligation into a judgment. It is said there cannot be two debts, one leviable by execution, and the other, continuing to be a charge on the property. The original debt is gone *transit in rem judicatum*. A fresh debt is created with different consequences (f). (*Per Bramwell, B., European Central Railway Co., IV Ch. D., 33.*)

LECTURE
IV.under a
decree not
for sale.View of the
Allahabad
and Madras
High
Courts.

(f) In *Drake v. Mitchell* (3 East, 251), Lord Ellenborough said: "I have always understood the principle of *transit in rem judicatum* to relate only to the particular cause of action in which the judgment is recovered

LECTURE
IV.View of the
Calcutta
and Bom-
bay High
Courts.

But, as you have already heard, both the Calcutta and the Bombay High Courts take an entirely different view. In the Full Bench Case of *Syed Imam Mumtazuddin Mahomed v. Raj Coommar Dass*, (XXIII Suth. W. R., 187; cf. 190), Sir Richard Couch, in delivering the judgment of the majority of the Judges, observed: "There is, we think, no warrant for holding that, when a sale is under a decree for sale, it conveys the rights of both creditor and debtor, but that when it is in execution of a simple money-decree, only the rights of the debtor pass, and the creditor retains his lien. The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor to the purchaser of mortgaged property, but to obtain satisfaction out of the security. Thus, whether a decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagor could jointly sell." Sir Richard Couch then goes on to point out that the mere taking of a money-decree does not extinguish the creditor's lien, and that, if the lien continues an incident of the debt when it passes from a contract-debt into a judgment-debt, as the creditor cannot sell the property and retain the lien, it must continue in existence, so far as may be necessary, for the protection of the purchaser. The same principle has been adopted by the High Court at Bombay. In the case of *Nursi Dass v. Je Jugalkor*, (I. L. R., IV Bom., 57), the learned Judges say: "We think that the principle now recognised by the High Court at Calcutta is the correct one, and that it is impossible to hold that the particular nature of the right acquired under the sale depends on the form of the decree on which the mortgagee has proceeded to satisfy his judgment-debt. The idea that the mortgagee only sells under a money-decree the right, title, and interest which the mortgagor has, at the time of the sale, appears to be a creature of the old Civil Procedure Code. What the mortgagee really seeks when he proceeds to sell, whether under a decree for sale, or a simple money-decree, is to obtain satisfaction out of his security, in fact, to

operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have. See also Bigelow on Estoppel, p. 134.

enforce his lien; and we do not see on what principle it can be said that, when the proceeding is in execution of a money-decree only, he still retains his lien for enforcement *quâ* mortgagee, if the debt be not discharged, by a second sale of the same property" (I. L. R., IV Bom., 63-64).

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IV.

I told you that the doctrine, that a sale under a money-decree only transfers the right, title, and interest of the debtor, has also been sometimes attempted to be supported on the ground that the passing of a money-decree has the effect of extinguishing the lien; but there is very little authority in support of the proposition; it being conceded, even by the Allahabad High Court that a mortgagee does not lose his lien by taking a money-decree. (*Khub Chand v. Kallian Das*, I. L. R., I All., 240; cf. 246. See also *Ram Churn v. Raghoobeer*, XI Suth. W. R., 481; *Nadir Hossein v. Baboo Pearoo*, XIX Suth. W. R., 255; cf. 259; *Gopeenath v. Sheosahoy*, I Suth. W. R., 315; *Surwan Hossein v. Golam Mahomed*, IX Suth. W. R., 170; *Syed Enam Momtazudeen v. Rajcoomar*, XXIII Suth. W. R., 187, overruling *Suduth Singh v. Bheenyeek*, XII Suth. W. R., 572; *Kokil Singh v. Mitterjeet Singh*, V Cal. L. Rep., 243.) All these cases distinctly recognise the survival of the lien after the taking of a money-decree, and there are numerous other decisions to the same effect in our books. In the English law also, the conversion of a debt into a judgment-debt, has not the effect of extinguishing an equitable lien incident to such debt. It is true that the Court may, if a proper case is made out, restrain the holder of the lien from pursuing both his remedies simultaneously; but there is nothing to prevent him from availing himself of his lien, if he has not been able fully to realize his money upon a judgment for the debt (*Barker v. Smart*, III Beav., 64.) The judgment of Baron Bramwell in the case to which I have already referred only lays down that, if the debt is turned into a judgment-debt in the absence of a covenant to pay the stipulated rate till realization, interest would run on the debt only as if it were a judgment-debt; but it is no authority for saying that the lien will be discharged although the debt remains due (*Per Pontifex, J.*, in *Janmojoy Mullik v. Dasmoni Dassi*, I. L. R., VII Cal., 114. See also *Fewings, Exp.*, XXV Ch. D., 338; distinguishing *Popple v. Sylvester*, XXII Ch. D., 98).

What passes in a sale under a money-decree.

In the case of *Venkata Nara Summah v. Ramia*, (I. L. R., II Mad., 108), it seems to have been contended that, Doctrine of merger.

LECTURE where a decree directs the sale of the mortgaged property,
 IV. the security is merged in the decree; the contention which
 — betrayed a curious misapprehension of the doctrine of
 merger was of course over-ruled. In giving judgment
 the Court said: "Now, it is quite clear that the decree
 of a Court of Equity giving effect to the mortgage-security
 which it preserves, is entirely different from a judgment
 which merges the cause of action. If the decree
 is a substitute for the mortgage, then the mortgage will be
 no longer existing. This result would lead to the destruction
 by a decree of Courts of Equity, of securities intended to
 be given effect to. For if the right to the security under the
 decree only takes the date of the decree, then all securities
 given by the mortgagor after the mortgage of 1864 and
 up to October 1871 (the date of the decree) being prior to
 the decree, the decree-holder would lose the benefit of
 his mortgage. The decree in a mortgage-suit is made
 according to the doctrines and practice of Equity, which
 would be utterly inconsistent with merger. It is the settled
 practice, when there is a decree of a Court of Equity for
 sale, and a sale thereunder for the mortgagee if he has a
 legal estate, to join in the sale and conveyance; the mere
 decree gives no title; it is the sale and conveyance which
 gives title. Again, this doctrine only affects the parties to
 the suit in which the judgment is obtained, if there is a
 suit on a joint and several bill of exchange against one of
 several debtors and against the other separate debtors
 (*King v. Hoare, supra*, XIII M & W., 494 & 504). The
 defendant in this present case was no party to the original
 suit on the mortgage of 1864, and is neither bound by it
 nor entitled to have any advantage from it. In this particular
 case, it is not necessary to determine whether a
 purchaser under a sale "only" of rights and interest of
 the defendant in the property (section 249, Act VIII of
 1859) under a decree in a mortgage suit acquires not only
 those rights and interest, but also the interest of the mortgagee
 under the mortgage." I may, however, observe that
 there is no express provision in the late or the present
 Code providing for the sale or conveyance of the mortgagee's
 rights to the purchaser. Sections 223 to 231 of the old Code
 refer to decrees for delivery of possession of immoveable
 property, and section 249 relates to sale of rights and interest
 of the defendant only. However, as the sale of the interest of
 such mortgagee must have

*Venkata
 Narah
 Summah
 v. Ramia.*

been intended to be provided for, and as there is only the one process for the sale of immoveable property under the Code, I think that the construction put upon the Code by the Calcutta High Court is a necessary result, viz., that under a sale in execution of a decree for sale in a mortgage-suit, the right and interest which the mortgagee and the mortgagor could jointly sell pass to the purchaser (*Syed Imam v. Raj Coomar Dass*, XIV Ben. L. Rep., 421).

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IV.

In the High Court on the Original Side it has been our practice to have sales made in execution of mortgage-decrees by auction, without the intervention of process of attachment.

The present Civil Procedure Code, section 286, contains provisions to enable the creditor and the purchaser to know what interest is really to be sold; but still the question in this case is not satisfactorily provided for, and cannot be so, until provision is made for the mortgagee joining in the conveyance, or unless effect is expressly given by legislation "to the sale by the officer as if the mortgagee had joined."

It is, however, important to observe that a money-decree and a decree for the specific enforcement of the lien differ in one respect. A money-decree creates a judicial lien only from the date of attachment and the judgment-creditor cannot, therefore, seize the property pledged to him under a mere money-decree, if it has been previously transferred by the mortgagor without bringing an action for the purpose of making it available in satisfaction of his debt. A decree for the specific enforcement of his lien, therefore, gives the mortgagee a somewhat higher right as against transferrees of the mortgaged property, for, not only may he disregard all alienations made after his decree, but the mortgagee is also protected by the principle of *lis pendens* against any transfer made after the institution of his suit. A mortgagee, who obtains a decree for sale, is, therefore, a judicially secured creditor holding a much stronger position than one who obtains merely a money-decree.

Money-decree and decree for specific enforcement of lien.

Again, it used to be thought that a sale under a mortgage in every case passed the property to the purchaser as it stood at the date of the mortgage, and that a decree for sale made in the presence of the mortgagor, but in the absence of the puisne incumbrancers or other persons possessing only a qualified interest in the

Rights of puisne incumbrancers.

LECTURE
IV.

View of the
Allahabad
High
Court.

equity of redemption, was a good decree, and passed a complete title to the purchaser; although an exception seems to have been recognised in favour of a purchaser out and out of the equity of redemption. (*Gopeenath Singh v. Sheosahoy Singh*, 1 Suth. W. R., 315; Ben. L. Rep., Sup. Vol., 72.) Now, this view, although it has been departed from by the other High Courts, is still maintained, to a certain extent, in the Allahabad Court. I am, of course, speaking of cases not affected by the Transfer of Property Act. It would seem that, according to the practice of the Allahabad Court, it is not absolutely necessary for the first mortgagee to make a puisne incumbrancer a party to a suit to enforce his security; and if the property is sold under a decree for sale made in the absence of the posterior mortgagee, his rights will be defeated, unless he can show some fraud or collusion. It is true, that if he is not made a party, he may, at any time before the sale, come in and redeem; but if he does not do so, and a sale actually takes place, his lien will be defeated unless he can show something more than the mere existence of his mortgage—some fraud or collusion, which entitles him to defeat the first incumbrance, or to have it postponed to his own. By saying that his lien will be defeated, I do not mean to convey the impression that it will be absolutely extinguished. It will only be transferred from the land to the purchase-money, and the purchaser under the sale will acquire an absolute title so far as the second mortgagee is concerned. (*Khub Chand v. Kulian Das*, 1. L. R., 1 All., 240; *Ali Hasan v. Dhirja*, 1. L. R., IV All., 518; *Sita Ram v. Amir Begam*, 1. L. R., VIII All., 324.) It is not quite clear, however, whether the same principle is applied by the Allahabad Court to lessees or other persons possessing a qualified interest in the mortgaged property.

The necessity for making all persons interested in the equity of redemption either by way of second mortgage or otherwise, parties to a suit by the mortgagee to enforce his security, was very fully discussed in the Full Bench Case of *Syed Mahomed Maumtaz-ud-din* by the Calcutta High Court (XXIII Suth. W. R., 187), in which it was held that a decree not made in the presence of persons who, either by way of second mortgage or otherwise, have acquired an interest in the equity of redemption, is not binding on the latter.

"If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights" (*Per* Couch, C. J., in *Haran Chunder Ghose v. Dinobundhoo Bose*, XXIII Suth. W. R., 190). The rights of such persons, however, are nowhere defined in the judgment. It is only said that the purchaser under a decree made in their absence purchases the property subject to their rights. He only buys the lien of the creditor and the equity of redemption, or such portion of it as resides in the debtor, that is to say, the entire interest which the mortgagor and mortgagee could jointly sell. It is, therefore, only where there are no third persons interested in the property, that it becomes absolutely vested in the purchaser.

LECTURE
IV.

*Haran
Chunder
Ghose v.
Dinobun-
dhoo Bose.*

The doctrine, therefore, which is to be found in some of the cases in the books that a sale by a mortgagee conveys the property to the purchaser free of all subsequent incumbrances must now be received with some qualification. A mortgagee is no doubt competent to transfer the property to the purchaser in the state in which it was pledged to him, but it can only be effected by a sale under a decree in which all persons interested in the equity of redemption are represented. If the sale takes place under a decree against the mortgagor alone, no complete title can pass to the purchaser, if there are others interested in the property.

You must remember that the effect of a mortgage is to transfer to the mortgagee only a portion, more or less extensive according to the nature of the mortgage, of the estate possessed by the mortgagor. Such transfer, however, does not preclude the mortgagor from dealing with the interest which remains in him after the execution of the mortgage; and where the mortgagor transfers, either wholly or in part, such interest, the transferee acquires against the mortgagee similar rights to those possessed by the mortgagor, so far as they are necessary for the protection of the interest conveyed to him. It follows that if the mortgagee desires to foreclose the mortgagor or to bring the property to sale, a purchaser from the mortgagor or a second mortgagee will be entitled to redeem the first mortgage, and thus to protect his own interest in the mortgaged property. Hence it has been held that to render a decree for foreclosure or sale effectual, the mortgagee must make subsequent purchasers or incumbrancers parties to the suit,

Case of
more than
one incum-
brancer.

LECTURE at least if he has notice of them or circumstances exist
 IV. which should have put him on inquiry. (*Venkata v. Canna*, I. L. R., V Mad., 185. See also *Venkata Narsammah v. Ramiah*, I. L. R., II Mad., 108; *Nara v. Gulab Sing*, I. L. R., IV Bom., 83; *Kanitkar v. Joshi*, I. L. R., V Bom., 442; *Damodar Dev Chand v. Naro Mihadev Kalikar*, I. L. R., VI Bom., 11; *Sobhag Chand Golab Chand v. Bhai Chand*, I. L. R., VI Bom., 193; *Naran Purshotom v. Dalutram Virchand*, I. L. R., VI Bom., 538; *Rupchand Dagdusa v. Davlatrav Vithalrav*, I. L. R., VI Bom., 495; *Radhavai v. Shamrav Vinayak*, I. L. R., VIII Bom., 168.)

Law of
 Procedure.

It would seem that, according to the practice of the Calcutta High Court, the question of notice is immaterial. (*Madhub Thakoor v. Jhoonuck Lall Dass*, XII Suth. W. R., 105; *Gunga Gobind Mondul v. Bane Madhub Ghose*, XI Suth. W. R., 548; *Norender Narain Singh v. Dwarka Lall Mondul*, I. L. R., III Cal., 397.) But the question is still a moot point in the Bombay as well as in the Madras High Court (See *Sankane Kalana v. Virupakshaha*, I. L. R., VII Bom., 146, and the cases cited above.) The mortgagee, however, is bound to make subsequent transferees parties to his suit if he has notice of such transfer or if circumstances exist which should have put him on inquiry, and possession is regarded as sufficient to put the mortgagee on inquiry and to fasten him with constructive knowledge of the subsequent transfer. It is important to observe that registration is regarded by the Bombay High Court as constructive notice; but this rule, which is not in accordance with the English law, has not yet been adopted by the other Courts. (See *Rup Chand Dagdusa v. Davlarao Vithalrao*, I. L. R., VI Bom., 495; *Laru v. Gulab Sing*, I. L. R., IV Bom., 83; *Radhai Vai v. Shamrao Vinayak*, I. L. R., VIII Bom., 168; cf. *Venkata Narsammah v. Ramiah*, I. L. R., II Mad., 108; *Venkata Somayazula v. Cannam Dhora*, I. L. R., V Mad., 184; *Ganga Dhara v. Sivarama*, I. L. R., VIII Mad., 246.) I may mention that in the English law, registration is not by itself notice; if, however, a person actually search the register, he will be deemed to have notice; but if a search is made for a particular period, the purchaser will not, by the search, be deemed to have notice of any instrument not registered within that period. (Sugden on Vendors and Purchasers, p. 761.) A different rule, however, prevails in America, and it has been adopted, as you have just heard, by the Bombay High Court.

It seems that according to the English law, knowledge of subsequent incumbrances is not essential, and that a person claiming under a judgment of foreclosure or a decree for sale will not acquire a good title as against claimants under a puisne title, although the mortgagee had no notice of their existence. But a person who is a party to a suit for sale or foreclosure will be bound by the decree, and it would be no answer for him to say that other persons who had also a right to redeem were not represented in the action. Again, a person who is a defendant in his character of mortgagor will be bound by the decree in respect of any interest possessed by him in another character, although such interest does not appear upon the proceedings. This principle, however, does not apply to a person who becomes entitled to another interest in the mortgaged estate derived from a person, after the decree, who was not a party to the suit. A mortgagor, however, may sometimes be bound by a decree in an appeal to which he is not a party if his interest is identical with that of the appellant. At any rate he cannot get rid of the decree otherwise than by a proceeding in the suit out of which the appeal arose (Fisher's Mortgage, pp. 680-81).

LECTURE
IV.

Knowledge of subsequent incumbrances not essential.

It is, therefore, clear, that in a suit by a mortgagee all persons claiming any interest in the mortgaged premises should be made parties, and that the rights of such persons cannot be prejudiced by a decree for sale made in their absence. But in no case whatever can a person claiming a paramount title be affected by the decree. A second or other puisne mortgagee may thus foreclose those subsequent, without joining those prior to themselves, nor are the owners of prior incumbrances necessary parties to a suit for sale, as the sale is made subject to those incumbrances. (But see sec. 85 of the Transfer of Property Act.) In the case of a derivative mortgage, however, the original mortgagee should be made a party. The mortgagor of an estate which has been pledged as a collateral security is also a necessary party to a suit for foreclosure against the principal mortgagor, and so also is a surety, although bound only by a personal covenant if he has paid off part of the debt due from the principal (Fisher's Mortgage, p. 813). In every suit for foreclosure or sale, the owner for the time being of the whole or any share of the equity of redemption must be present, and it is incumbent on the mortgagee where the estate has been sold in lots to proceed against all the

Who ought to be made parties to the suit.

Mortgagee a party.

Owner of equity of redemption, a party.

LECTURE
IV.Execution
purchaser
when
party.

purchasers (*Peto v. Hammond*, XXIX Beav., 91). In this country a purchaser under an execution-sale, if his purchase has not been confirmed under the Code of Civil Procedure, is not a necessary party, as his title accrues only from the date on which the sale is confirmed under Section 316 of the Civil Procedure Code. Under Act VIII of 1859 the purchase related back to the date of the sale, and a purchaser under that Act, although his sale might not have been confirmed, was a necessary party to a suit by the mortgagee for sale or foreclosure (*Bhairob Chunder Bondopadhyaya v. Showdaminy Debi*, I. L. R., II Cal., 141. See also *Rameshur Nath Singh v. Mewar Jagjit Singh*, I. L. R., XI Cal., 341, in which latter case, however, the attention of the Court was not drawn to the difference between the effect of a sale under Act VIII of 1859, and one under Act X of 1877. See also the unreported judgment in second appeal No. 54 of 1886 decided by Petheram, C. J. and Beverly, J., on the 7th December 1886 *Kali Dass Mookerjee*, appellant v. *Sheikh Arshad and others*, respondents.)

Party with
contingent
interest.

It must not, however, be understood that every person having a contingent interest must be made a party to an action by the mortgagee. In England, where the right of redemption has become the subject of settlement, it is sufficient to bring before the Court the first person entitled to the inheritance, and where there is no such person a decree against the tenant for life, will, it appears, bind the inheritance (*Fisher's Mortgage*, p. 815). In this country the widow would seem to be entitled to represent the estate in an action by the mortgagee except where the mortgage is one by the widow herself, in which case the reversioners ought to be made parties (*Nugender Chunder Ghose v. Kaminee Dossee*, XI Moore Ind. App., 241; VIII Suth. W. R., P. C., 17; *Mohima Chunder Roy v. Ram Kishore*, XXIII Suth. W. R., 174.) Similarly in cases governed by the Mitakshara, it is sufficient to make the father a party without bringing in his sons. (*Krishnama v. Perumal*, I. L. R., VIII Mad., 388).

Mitakshara
father a
party.Virtual re-
presenta-
tion.

The question as to how far a person not a party to a suit will be bound by a decree made in his absence, is frequently complicated by questions of substantial or virtual representation as it is sometimes called, which have introduced the greatest uncertainty into the law. The topic properly belongs to the law of procedure; but a few words on it will not, I trust, be wholly out of place. The general

rule, no doubt, is that no person can be affected by a decree in a suit in which he is not represented; but exceptions have been engrafted from time to time upon the principle which have had the effect of 'well nigh eating up the rule.' It is probable that our Courts have been induced by a desire to do substantial justice to depart from the fundamental principle that no person can be affected by a decree made behind his back. But a too excessive regard for the interest of the execution-purchaser, which has presumably brought about this relaxation of the rule, has led to a great deal of uncertainty advantageous only to the 'prowling assignee,' and the trafficker in doubtful litigation. Those of you who wish to study the subject, will do well to consult the following cases, which, however, are only a few out of the many that could be cited, and in some of which the question of the proper representation of minors in suits by or against them was also involved:—*Lalla Seetaram v. Rambaksh Thakoor*, XXIV Suth. W. R., 383; *Court of Wards v. Maharaja Coomar Ramaput Singh*, X Ben. L. Rep., 294; S. C., XIV Moore Ind. App., 605; *Ishan Chunder Mitter v. Buksh Ali Soudagar*, Marshall, 614; S. C., Spl. No. Suth. W. R., 190; *Sadabut Prosad Shahoo v. Full Bash Koer*, III Ben. L. Rep., F. B., 31; *Baijan Doobey v. Brij Bhokun Lall Awaste*, I. L. R., I Cal., 133; *Mohima Chunder Roy Chowdhry v. Ram Kissari Acharjee Chowdhry*, XV Ben. L. Rep., 142; *Hendry v. Mutty Lall Dhur*, I. L. R., II Cal., 395; *Sham Coomar Roy v. Jotton Bibee*, XIV Suth. W. R., 448; *Hukeem Bibee v. Khaja Gawhurali*, V. Wym., 27; *Hamir Singh v. Mussammut Zakia*, I. L. R., I All., 57; *Rajkristo Singh v. Bungshee Mohon Babu*, XIV Suth. W. R., 448 note; *Sheikh Abdool Kurreem v. Syed Jaun Ali*, XIV. Suth. W. R. 56; *Raja Roghoo Nundon Singh v. Wilson*, XXIII Suth. W. R., 301; *Mussammut Nuzeerun v. Moulvi Ameer Udden*, XXIV Suth. W. R., 3; *Lalla See Ram v. Ram Baksh Thakoor*, XXIV Suth. W. R., 383; *Powell v. Wright*, VII Beav., 444 at p. 450; *Cockburn v. Thompson*, XVIV esey, 321, at pp. 325-26. *In the Matter of the Petition of Hira Lall Mookerji*, VI. Ben. L. Rep., Ap., 100; *Syud Emam Mumtazuddeen Mahomed v. Ram Coomar Doss*, XIV Ben. L. Rep., 408; *Lekraj Roy v. Becha Ram Misser*, VII Suth. W. R., 52; *Hunooman Persad Pandey v. Mussammut Koonwarree*, VI Moore Ind. App., 393, at p. 413; *Gopee Choron Bural v. Mussammut Lukhee Ishwaree Dibia*, III Macnaghten Sel. Rep., 93; *Deen Dyal*

Cases on
the point.

LECTURE IV. *Lall v. Jagdeep Narain Singh*, I. L. R., III Cal., 198; *Assamathem Nissa Bibee v. Roy Luchmiput Singh*, I. L. R., IV Cal., F. B., 142; *Shekh Abdoollah v. Haji Abdullah* I. L. R., V Bom., 8; *Jathanaik v. Venkatapa*, I. L. R., V Bom., 14; *Akoba Dada v. Shakha Ram*, I. L. R., IX Bom., 429; *Sotish Chunder Lahiry v. Nil Komal Lahiry*, I. L. R., XI Cal., 45. See also the cases collected in *Vithal Doss v. Karson Doss*, V Bom. H. C. Rep. (O. C. J.) 76. As to the right of a Hindu widow to represent the estate, see *Gopee Mohon Thakoor v. Sebnun Koer*, East's Notes, No. 64; II. Morley's Digest, 105. See also the cases cited in *Lulchand Ramdayal v. Guntibai*, VIII Bom. H. C. Rep. at p. 156, O. C. J.

I will now proceed to consider the rights of transferees of the equity of redemption if the property under mortgage is sold in their absence. It will be convenient to discuss in the first place the privileges of subsequent incumbrancers and then those of other transferees of the rights of the mortgagor.

Rights of
an absent
transferee
of equity
of redemption.

*Gopibun-
dhu Shatra
v. Kalipado
Banerjee.*

The rights of the puisne mortgagee were discussed by the Calcutta High Court in the case of *Gopibundhu Shatra v. Kalipuddo Banerjee* (XXIII Suth. W. R., 338). In that case the debtor having mortgaged his property to two persons in succession, the first mortgagee brought a suit and obtained a decree but only against the mortgagor. The property was afterwards sold under the decree and purchased by the mortgagee himself. The second mortgagee also sued the debtor, and the property was again sold under his decree and purchased by the creditor. The Court held that the purchaser under the first decree was entitled to possession; but that, as the puisne mortgagee was not a party to the decree under which the purchaser acquired his title, the purchaser under the second decree had a right to pay off the amount due under the first mortgage, and that upon such payment he would be the "holder of the first charge" on the property. You will observe that this case recognises the right of a puisne incumbrancer to pay off the debt on account of which the estate may have been sold, and thus to treat the purchaser as the owner of the estate subject to his claim. As to the question of possession, the Court held that the right to the possession of the property was vested in the debtor and passed to the purchaser under the first execution. I shall try to illustrate the principle laid down by the Court by putting a hypothetical case.

LECTURE
IV.

Suppose an estate is worth Rs. 20,000, and that it is mortgaged first to A for Rs. 15,000 and then to B for Rs. 3,000. The interest which remains in the debtor after the execution of the two mortgages is, therefore, worth only Rs. 2,000. Now, suppose the property is sold by A in execution of a decree against the debtor and in the absence of B. The purchaser purchases only the lien of the creditor and the right of redemption subsisting in the debtor, which together is by the hypothesis worth Rs. 15,000, plus 2,000, = Rs. 17,000. Now B would have a right to pay off the debt due under the first mortgage, and to treat such payment, together with the amount due to him, as a charge on the property, *i.e.*, by paying off to the purchaser the fifteen thousand due under the first mortgage, he would acquire a charge on the property for Rs. 15,000, plus 3,000, = Rs. 18,000. But, in order to enforce that charge he would have to bring a suit against the purchaser who, as we have seen, has acquired the right of redemption of the debtor. Now, if the purchaser pays him off, he acquires an absolute title to the property. But in that case he would have to pay altogether Rs. 17,000 minus 15,000, *i.e.*, Rs. 2,000, plus 18,000; = 20,000, which we have assumed to be the value of the property. But suppose the purchaser does not choose to pay off the consolidated charge on the property, the property must be sold, and assuming that it fetches its proper price, the mortgagee gets Rs. 18,000, and the purchaser gets back the two thousand rupees which he had paid. If the property is so heavily burdened that the right of redemption is worth nothing, the purchaser would not be safe in paying anything for it in excess of the debt due under the first mortgage. To that extent, however, he would be secure against the claims of subsequent incumbrancers. If the purchaser pays less than the amount of the debt secured by the first mortgage, he may not perhaps be able to insist upon the second mortgagee paying to him anything in excess of the purchase money, although I am not to be understood as saying that the case would not be different if the creditor himself became the purchaser.

When a second mortgage is created in favour of any person, he becomes entitled to pay off the first mortgage or to sell the property subject to the prior security; and this right is not destroyed by the acquisition by the first mortgagee of the right remaining in the owner after the

Sale by
puisne
incum-
brancer.

LECTURE IV. creation of the second mortgage as his right to call for a sale of the property, subject to the rights of the prior incumbrancer, cannot obviously be defeated by a transaction to which he is no party. A sale by a puisne incumbrancer, therefore, will pass to the purchaser whatever rights remain in the owner; and if the right of possession has not been parted with, the sale will carry with it a right to recover possession of the mortgaged property (*Vencatachella Kandian v. Panjanádien*, I. L. R., IV Mad., 213. See however, *Rámu Náikan v. Subbaraya Mudali*, VII Mad. H. C. Rep., 229). If, however, the first mortgagee is in lawful possession by virtue of his agreement with the mortgagor or otherwise, his possession cannot be disturbed by a purchaser under a second mortgage. (*Mudhun Mohun Dass v. Gokul Doss*, X Moore Ind. App., 563; V Suth. W. R., 91; *Raghunath Prosud v. Jurawar*, I. L. R., VIII All., 105.) As between two purchasers, the right of possession is determined by the priority, not of the respective mortgages, but of the respective sales, provided, of course, that the possession continued with the mortgagor when the property was first brought to sale. (*Nanack v. Teluck*, I. L. R., V Cal., 265; *Dirgopal v. Bolakee*, I. L. R., V Cal., 269.)

Rights of
the first
buyer of
the equity
of redemp-
tion.

It follows from what I have said that the person who first buys the equity of redemption will be entitled in his character of transferee to redeem all mortgages on the property. (*Damodur Devachand v. Mahadev*, I. L. R., VI Bom., 11.)

I may mention that it is not usual in the mofussil where a puisne mortgagee is a party to take an account of what is due to him on his security. It seems, however, that a different practice is observed on the original side of the High Court, which may well be followed in the mofussil Courts. (*Aukindro Bhoosun Chatterji v. Chunnoo Lall Johurry*, I. L. R., V Cal., 101.)

The principle applicable to subsequent mortgages has been extended to other persons possessing a qualified interest in the equity of redemption—lessees, for instance, holding under beneficial leases created subsequently to the mortgage.

As I have already pointed out, the fact of the existence of a first mortgage is no bar to the creation of a second mortgage or to an alienation of the whole or a part of the interest of the debtor, subject to the first mortgage.

If, therefore, the mortgagor carves a tenure out of the mortgaged property, the Court cannot in the absence of the tenant sell anything except the rights of the creditor and the outstanding right of the debtor, namely, the right of the former to a charge on the land and of the latter to the reversion. The tenant, therefore, cannot be affected by a sale conducted behind his back, nor can the purchaser disturb his possession. (*Kokil Sing v. Dulichand*, V Cal. L. Rep., 243.)

LECTURE
IV.

A similar rule was laid down in the case of *Baij Nath Sing v. Gobordhone Lall* (XXIV Suth. W. R., 210), in which the purchaser at a sale by the mortgagee sought to set aside a lease created by the mortgagor after the mortgage. The lessee was not a party to the suit by the mortgage creditor, and the order directing the sale was made in his absence. It was contended, on behalf of the purchaser under the execution, that the lessee was not a necessary party to the suit, and that as the lease had been executed subsequently to the mortgage, it was not binding upon the purchaser. The Court, however, held otherwise, being of opinion that the sale did not pass the property absolutely to the purchaser, and that the rights of the lessee who claimed an interest in the property could not be prejudiced by a sale under a decree made in his absence. It would, however, seem, although the point was not before the Court, that the purchaser, as assignee of the lien of the creditor, would have a right to insist upon the lessee's redeeming him, and, on his failure to do so, to sell the property, the purchaser being entitled to a charge for the price paid by him on the proceeds, to the extent of the lien of the mortgagee who first put up the property to sale; and this would seem to be the only course open to the purchaser if the mortgage-security was impaired by the creation of the term. The price paid by the purchaser will, as you have just heard, be a first charge on the property. The tenant would then have a right to be reimbursed out of the proceeds, the purchaser obtaining the surplus, if any, as representing the value of the outstanding right in the mortgagor. Under the law as it stood before the Full Bench ruling in *Haran Chunder Ghose's case* (XXIII Suth. W. R., 187), the sale by the mortgagee would have avoided the lease, and the right of the tenant would have been confined to the surplus proceeds of the sale. (*Brojo Kishoree Dassee v. Mahomed Salim*, X Suth., W. R., 151; I Ben. L. Rep.,

*Baij Nath
Sing v. Go-
bordhone
Lall.*

LECTURE A. C., 154. See also *Raj Narain Singh v. Sheera Mean*,
 IV. VII Suth. W. R., 67; *Beejoy Gobind Bural v. Bheekoo*
 — *Roy*, X Suth. W. R., 291.)

Right of
 redemption
 of an
 absent in-
 terested
 party.

I have already said that the effect of not making a person who has an interest in the equity of redemption a party, would be to let him in to redeem. It seems that at one time some reluctance was felt by the Court in carrying out this principle to its logical consequences and the case of *Mothura Nath Paul v. Chunder Money Dabee* (I. L. R., IV Cal., 817) is sometimes cited as an authority that it is not always necessary to make the transferee a party defendant in order to bind his interest. But that case was very peculiar in its circumstances, and the purchaser, at the sale by the mortgage, was the holder of a subsequently created putnee who was in actual possession of the property, but it was nevertheless sold under the decree to which he was no party, although he had, equally with the donee of the original mortgagor, a right to be represented in the suit. The putneedar in that case was in a manner forced to make the purchase for the protection of his own putnee rights. As between him and the donee the Court seems to have thought that there was an equity in his favour overriding the claims of the donee. It must also be noticed that the rights of the donee were expressly reserved, the Court observing that if she could establish her title to the property in any suit properly framed for the purpose, she would be at liberty to do so (g).

Account of
 mortgage
 debt.

There appears to be some difference of opinion as to the principle on which the account of the mortgage-debt should be taken in such cases. In some cases the account has been taken on the basis of what has been found due under the previous decree. (*Mohan Manohwar v. Tognuka*, I. L. R., X Bom., 224.) In other cases, however, the account has been taken on a somewhat different basis. (*Sheikh Abdoollah Saiba v. Hajee Abdoollah*, I. L. R., V Bom., 8.) I need scarcely point out that the right of redemption must, if the mortgagee insists upon it, be exercised in respect of the mortgage as a whole, as no redemption can be allowed of a part in this any more

(g) There are, however, some reported cases in which this right does not seem to have been given effect to. (*Kheeraj Jusrup v. Lingaya*, I. L. R., V Bom., 2; *Sheshgiri v. Salvador*, I. L. R., V Bom., 5. But see *Sheikh Abdoollah v. Haji Abdoollah*, I. L. R., V Bom., 8; *Jatha Naik v. Venkatapa*, I. L. R., V Bom., 14; *Mohan Manohwar v. Tognuka*, I. L. R., X Bom., 224, and the cases cited therein.)

than in other cases, although the effect of this might be to keep alive the right of redemption even of those who were parties to the decree, and, therefore, in one sense bound by it.

LECTURE
IV.

You have heard that it is not the practice in the mofussil Courts for the mortgagee, who sues for and obtains a sale of the mortgaged premises, to make a formal conveyance to the purchaser, and yet the property itself, as it stood when the mortgage was made, passes to the purchaser, whatever may be the language of the certificate of sale. The mortgagee who puts the Court in motion, and at whose instance the property is sold, is estopped from denying the title of the purchaser, although he does not execute a formal conveyance to the purchaser. (*Ravji v. Krishaji*, XI Bom. H. C. Rep., 139, 142; *Kasan Dass v. Pranjivan*, VII Bom. H. C. Rep., 146, A. C. J.; *Shringarpure v. Pethe*, I. L. R., II Bom., 662; *Khevraj v. Lingayur*, I. L. R., V Bom., 2; *Sheshgiri Shamvaj v. Salvadorvas*, I. L. R., V Cal., 5; *Sheikh Abdoollah v. Hajee Abdoollah*, I. L. R., V Bom., 8). It is immaterial whether the mortgagee is himself the purchaser, as the fact cannot affect the estate which passes by the sale. (*Damodor Dev Chand v. Naro Mohoder*, I. L. R., VI Bom., 11; *Mohan Manor v. Tognaka*, I. L. R., X Bom., 224.)

Practice in
mofussil
Courts.

Although an equity of redemption is saleable in execution under the Code of Civil Procedure, a mortgagee is not entitled to sell the bare equity of redemption under a mere money-decree(h). We have seen that in the mofussil whenever a mortgagee sells the property pledged to him, whether the decree is a mere money-decree or a decree for sale of the mortgaged property, the mortgagee is estopped from denying that the lien is transferred to the purchaser. The evils, therefore, so forcibly pointed out by Mr. Justice Macpherson, as attending a sale of the bare equity of redemption, cannot arise in the mofussil. (*Kamini Devi v. Ram Lochon Sircar*, V Ben. L. Rep., 450; see also *Raja Ajudha Ram Khan v. Shama Choron Bose*, 6th July 1852; Supreme Court, Bourke's Rep., 161, note.) The only disadvantage under which the mortgagor labours is that he does not get the benefit of a period for redemption. According to the practice on the original

Mortgagee
not entitl-
ed to sell
equity of
redemption
under
money-
decree.

(h) See Sec. 69 of the Transfer of Property Act.

LECTURE side of the High Court, the lien of the mortgagee does not
 IV. pass to the purchaser upon a sale under a mere money-decree, and the execution of such a decree is, therefore, limited to property not comprised in the mortgage. (Belchamber's Practice, pp. 336-337. But see *Bhugobutty v. Shama*, I. L. R., I Cal., 337.) But the mofussil practice is different; and, it seems to me, therefore, that the observations of some of the learned Judges as to the effect of a mortgagee buying the property mortgaged to him in the mofussil are based on the erroneous supposition that unless the mortgagee joins in the sale so as to pass his interest, a sale by the Court would only transfer the equity of redemption.

Right of transferee to redeem a sale-purchaser.

Kassim-munnessa Bibi v. Nil Rotton Bose.

The next question which presents itself is in respect of the terms on which a transferee would be entitled to redeem a purchaser at a sale by the mortgagee under a decree made in the absence of the transferee. In the case of *Kassim-munnessa Bibi v. Nil Rotton Bose*, the Court said in determining the terms on which the putneedar should be allowed to redeem: Now, "the price paid by the plaintiff for the land in dispute when he purchased on the 30th of November 1867, may have been either more or less than that aggregate amount. If it was more, we think that the defendant is entitled to redeem on paying the aggregate amount (with interest as hereinafter mentioned) and no more; because it was not her fault that she was not made a party to the mortgage suit and she has not received the excess. If, on the other hand, it was less, we think the defendant is entitled to redeem on paying the amount paid by the plaintiff as purchase-money on the 30th November 1867 (with interest as hereafter mentioned). The defendant having the alternative of paying either of the amounts referred to, must also pay interest at the rate of 6 per cent. per annum for three years preceding the date of the decree of the Lower Court upon the capital sum so to be paid until the date of payment. The defendant will be allowed six months within which she must pay these sums, and the decree will be, that unless she pays the smaller of the capital sums before indicated, together with interest thereon as before mentioned, within the said six months, she will be foreclosed, and the plaintiff will be entitled to a decree for *khas* possession. If, on the other hand, she makes the payment directed within the six months, then, the plaintiff, upon such payment, must convey to the defendant all the

interests of the plaintiff in the property," (*Kassimunnessa v. Nil Rotton Bose*, I. L. R., VIII Cal., 83). But ordinarily an account ought to be directed which must be taken in the presence of all persons interested in the equity of redemption. In the case of *Okhil Singh v. Dooli Chand*, (V Calc. L. Rep., 243), the Court said: "The plaintiffs have, by their purchase, acquired a first charge for the first mortgagee's lien on the land; but the mortgaged property consisted of many separately defined portions, though there was no distribution of the debt, and these have been separately sold. How far each purchaser can charge the particular portion of the property in which he has acquired an interest can only be determined by distributing the debt; but for this purpose the proper parties are not before the Court."

If it were otherwise there might be such a result as this: five properties are mortgaged in the lump for rupees 5,000, and, subsequently, mukurrari grants are made to five different persons. The mortgagee sues the mortgagor alone, gets a decree and order for sale, and the properties are lotted separately; Nos. 1 to 3 sell for Rs 2,000 each, and the sale stops: the mukurroridars of Nos. 4 and 5 would be free of any charge, though they deliberately took subject to an undefined charge. Mukurroris 1 and 2 would be subject to a charge of Rs. 2,000, and 3 to one of only Rs. 1,000, taking them to be sold in this order. Thus, it appears that until all parties concerned are brought into Court, nothing can be done (*Okhil Sing v. Duli Chand*, V Calc. L. Rep., 243).

In the case of *Neela Canto Banerjee v. Shooresh Chunder Mullick*, (I. L. R., XII Cal., 414), the High Court having allowed the defendant, who had purchased only a portion of the mortgaged property, to redeem the plaintiff, who was also the mortgagee, on payment only of the price paid by him at the execution sale without directing any accounts at all; the Privy Council observed that it was quite a new thing to allow the purchaser of a single fragment of the equity of redemption without bringing the other purchasers before the court to have an account as between himself and the mortgagee alone, so that the mortgagee might be paid off piecemeal. Such a law, their Lordships observed, would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent; and he would have separate suits

LECTURE
IV.

*Neela Canto
Banerjee v.
Shooresh
Chunder
Mullick.*

LECTURE against each of them, and suits in which no one of the
 IV. parties would be bound by anything which took place in
 — a suit against another. Different proportions of value
 might be struck in the different suits, and the utmost
 confusion and embarrassment would be created.

But so far from contemplating accounts between all the
 parties concerned, the High Court did not direct any account
 at all; not even the ordinary account on which a redemption
 decree must be founded. They went at once to say, of
 their own discretion, what should be the price paid for this
 mortgaged property. (*Neela Canto Banerjee v. Soorash
 Chunder Mullick*, I. L. R., XII Cal., 423) (i).

Mortgagee
 sells the
 property
 discharged
 of his own
 lien.

In describing the interest which is transferred to a
 purchaser under a sale by a mortgagee, I said that he obtains
 what the mortgagee and the parties interested in the equity
 of redemption who are on the record could jointly convey;
 but it is pointed out in a recent case (*Ram Nath Dass v.
 Baloram Phookun*, I. L. R., VII Cal., 677), that it would
 be more correct to say that the mortgagee sells the property
 of the mortgagor discharged of his own lien. The Court
 after stating that the Full Bench Ruling in Syed Momtazood-
 deen's case (XXIII Suth. W. R., 186) had laid down, first, that
 a mortgagee who obtains a decree for sale of the mortgaged
 property cannot sell that property, reserving his own rights
 over it, because such a proceeding would be inconsistent with
 the avowed object of the sale, and, secondly, that if the mort-
 gagee obtains only a simple money-decree, he is precisely in
 selling the property in the same position so far as his own
 interest is concerned as if he had obtained a decree for sale,
 goes on to say "but how can this ruling of the Full Bench
 assist the appellants' argument in this case? It seems to
 us to be quite beside it. Indeed, the reason of the Full
 Bench seems rather opposed to the appellants' contention.

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 Boloram.*

When the mortgagee puts up for sale the mortgagor's
 property and sells it, his lien passes with the property,
 because, having regard to the nature and object of the sale,
 the lien is inseparable from the property.

But when the mortgagee professedly puts up the mort-
 gagor's property for sale, but, in fact, sells nothing, because

(i) I ought to mention in passing that the above case is also an authori-
 ty for the proposition that a purchaser of the equity of redemption who
 alleges a paramount title and disclaims the right to redeem when the
 mortgagee seeks to enforce his lien and thus causes the dismissal of the
 suit, cannot afterwards set up a claim to redeem.

mortgagor has no property to sell, why should the mortgagor's lien pass to the purchaser? The reason why it passes in the other case is entirely absent in this; and I know of no provision of the law which enables a judgment-creditor, under colour of selling his judgment-debtor's property, to sell his own. LECTURE
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Besides which, it appears to me, that if the appellants' contention were correct, it would defeat the very object of the Full Bench, which was to prevent the mortgagee from selling the mortgaged property, reserving to himself his own lien.

Suppose a case of this kind. A mortgages a property to B, and then sells his own interest to C, B sues A for the mortgage-debt, obtains a money-decree, and puts up A's right, title, and interest in the property for sale.

At the same time, B also sues C, praying that the mortgaged property in C's hands may be sold to satisfy the mortgage-debt; and he obtains a decree to that effect.

The sale under the decree against A takes place first, and D becomes the purchaser. The property is then sold under the decree against C, and E becomes the purchaser.

Under which sale does the mortgagee's lien pass?

If the contention of the appellants' pleader is correct, it passes by the first sale, and yet the consequence of this would be that E, under the second sale, would have bought the mortgagor's property, subject to the mortgagee's lien, which would then be vested in D. In other words, the mortgagee would thus have been enabled to do that which the Full Bench considered to be contrary to justice, namely, to sell the mortgagor's interest for payment of his mortgage-debt without giving the purchaser the benefit of his own lien." (*Ramnath Dass v. Boloram Phookun*, I. L. R., VII Cal., 681—682.)

It is somewhat remarkable that this very case is put in a hypothetical form by one of the learned Judges of the Allahabad High Court to show that the lien of the mortgagee does not pass to the purchaser under a money-decree. In the case of *Khubchand v. Kallian Dass* (I. L. R., I All., 240.) Mr. Justice Turner says: "the Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then, if the mortgagee sues on the personal undertaking only, he must sue

*Khubchand
v. Kallian.*

LECTURE IV. the original mortgagor, he cannot implead the purchaser, and if he obtains a decree, he can enforce it only against the property of the mortgagor who, *ex hypothesi*, has no interest left in the mortgaged property, and if, instead of selling the mortgaged property, he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser (*Khubchand v. Kallian Dass*, I. L. R., IV All., 217.)

Nature of a simple mortgagee.

You will observe that the security acquired by a mortgagee under a simple mortgage is the right to sell the entire estate of the mortgagor as it existed at the date of the mortgage, free of any charges on the property subsequently created by the mortgagor. The recent authorities have made no alteration in respect of the nature of the security to which the mortgagee becomes entitled under this form of mortgage, the rule laid down by the Court being a mere rule of procedure. The mortgagee has still the right to sell the entire estate of the mortgagor as it existed at the date of the mortgage, but he must take care to bring all puisne claimants before the Court. Under a decree for sale obtained in their absence, the mortgagee can only transfer to the purchaser the benefit of his own lien and such interest as may be possessed by the mortgagor at the time of the institution of the suit.

Purchase by mortgagee.

A mortgagee may, with the permission of the Court, buy the mortgaged property in execution of his own decree; but it has been thrown out in a recent case that where the mortgagee himself is the purchaser, he must prove that he paid a fair price for the property. In the case of *Hart v. Tara Prosonno Mookerjee* (I. L. R., XI Cal., 718) the Court said: "But it is clear that when a mortgagee has sold any portion of the mortgaged property under his decree, and has purchased it himself, he is bound, before he can proceed further against the mortgagor, to prove that there is still a balance due to him, and that the property sold realized a fair amount, and this ought to be inquired into most carefully by the Court to which the application to share rateably is made. The mere fact that the property was purchased at auction is not alone sufficient to prove its value, where the mortgagee himself is the purchaser. It would manifestly be inequitable to allow a mortgagee to buy in the mortgaged property at auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of other creditors." Similar

observations have been made in other cases ; but I am not aware of any distinct authority for the position that a mortgagee buying with the leave of the Court is in a different position from an unsecured creditor, while there are cases directly the other way (j). In the case of *Mohon Manor v. Togoo Wooka* (I. L. R., X Bom., 224,) the Court held that when a mortgagee brings to sale the mortgaged property, he sells the estate, as it stood at the date of his mortgage, free from all subsequent incumbrances, and the fact that the plaintiff is himself the purchaser cannot affect the estate which passes by the sale (see also *Damodor Dev Chand v. Mohadev Kelkar*, I. L. R., VI Bom., 11).

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case.

It is perhaps idle to expect that the authorities allowing a puisne mortgagee to redeem in the absence of fraud, notwithstanding the opinion of the Allahabad High Court to the contrary, will be reconsidered (k). I may, however, be permitted to observe that it is somewhat doubtful whether the Courts have not gone too far in their anxiety to protect the interests of puisne incumbrancers. It is true that no person ought to be affected by an order made in his absence. But how is the puisne incumbrancer affected by the conversion of the estate into money ? He may have a right to the surplus proceeds, and if that is secured to him, it is difficult to discover how he can be possibly prejudiced by a decree for sale, (see Section 295, Proviso (c), clause (3) of the Civil Procedure Code.) In every system of law in which the pledgee possesses a right of sale, what he sells is the property pledged to him, and not merely an undefined interest in the pledge, and no claimants upon the property posterior to the first pledgee can interfere with this right. (See the observations of Markby, J., in *Haran Chunder Ghose v. Denobundhoo Bose*, XXIII Suth. W. R., 193.) I do not deny that very different considerations would arise if the mortgagee asked not for a decree for sale, but one for foreclosure. A decree for foreclosure stands upon a very different footing from a decree for sale, and there is no real analogy between the two.

(j) As to the effect of a decree-holder buying without the leave of the Court, see *Rookni Bulloo Roy v. Brojo Nath Sircar*, I. L. R., V Cal. 308 ; *Jachherbai v. Horibai*, I. L. R., V Bom., 575 ; *Mahomed Gazeer Chowdhury v. Ram Loll Sen*, I. L. R., X Cal., 757 ; *Mothoora Dass v. Nathooni Lal Mahata*, I. L. R., XI Cal., 731.

(k) For the present state of the law, see sec. 85 of the Transfer of Property Act.

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execution.Practice of
Continent-
al Courts.

There is, besides, another aspect of the question which also deserves consideration. It is very seldom, indeed, that an estate sold under an execution realizes an adequate price; and the encouragement offered to speculative purchasers is one of the principal sources in this country of a good deal of litigation never very healthy, and frequently dishonest. It is not difficult to foresee that the result of the recent authorities will be to aggravate the evil, and that both mortgagor and mortgagee will suffer by the sale of rights which must remain to a great extent uncertain and undefined. The mischief is guarded against in other systems of law by provisions which, while they secure to the creditor his just rights, prevent a needless sacrifice of the property of the debtor. Indeed, in this respect the interest of the creditor ought to be identical with that of his debtor, as the object of both must be to secure the best possible price for the property. Under the law as it was formerly understood this could always be effected by a sale by the first pledgee, who it was thought could pass the property free of all subsequent incumbrances. In the case of a puisne incumbrancer the result was, no doubt, different, as a sale by him was subject to all prior mortgages. But I am by no means sure that even in this case it might not be more convenient to allow the creditor to sell the estate, the preferential right of the prior mortgagee to the purchase money being secured to him. I am afraid that the suggestion may be regarded as too sweeping, if not altogether wild and impracticable; and I am free to confess that it is one which I should not have ventured to make if I had not found similar provisions in the law of France and other countries, whose jurisprudence is moulded on the Roman law. Roughly speaking (for I do not pretend to give a detailed account) a sale under an execution extinguishes all hypothecary rights or debts affecting the property, the right of the creditor being transferred to the purchase-money. For this purpose the proceeds of the sale are deposited in the Court, and the creditors of the mortgagor are cited to appear and assert their claims. A proceeding is then adopted by which the respective priorities of the creditors are ascertained, and the proceeds divided according to the result of the investigation. This proceeding is called the *preferentia* and concurrence of creditors. Its object is to comprise the adjudication and assertion of those claims which are prior

or preferred, as well as those which are concurrent. Each claim to be preferred or ranked concurrently is regularly brought to issue and debated; and the Court, by its sentence, declares the order in which the parties are to rank on the proceeds. (Code de Procéd. Civile, tit. 14; see also Burge's Foreign and Colonial Law, Vol. II, pp. 592-93; Vol. III, pp. 229-30.) This is a very simple and intelligible rule. It secures to the debtor a fair price for his property, and thus, as I have already explained, effectually protects the interests of the creditor. Trafficking in doubtful claims—one of the least interesting phases of litigation in this country—finds no encouragement in such a system, while the rights of the creditors are protected with a jealousy not less scrupulous than that which we find in systems with which we are more familiar (*l*).

I have ventured to detain you with this slight sketch of the Continental system of execution, not because I think there is much likelihood of the introduction of the principle into our own law (*m*); but because I think the student ought to have some acquaintance with the leading features of a system of jurisprudence which obtains in a large part of the civilized world. A too exclusive attention to any one system is likely to induce a habit of mind, which I am afraid is to be found in other persons besides the learned conveyancer, mentioned by Mr. Justice Stephen, who thought that an attempt by the legislature to preserve contingent remainders without the intervention of trustees, was as absurd as an attempt to alter the laws of nature. The worthy conveyancer was only a type of a great many lawyers, whose number is perhaps larger than is generally supposed, and who believe not only in the necessity but also in the sacredness of every technical rule, however unreasonable, which they find in the

(*l*) The Hon'ble Mr. Evans in his speech on the motion to pass the Transfer of Property Act, said: "There being no machinery for bringing together into one suit the various incumbrances on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things, had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered."

(*m*) An attempt, although slight and imperfect, has been made in this direction by the Legislature in section 295 of the Code of Civil Procedure and sections 57 and 96 of the Transfer of Property Act. I, however doubt very much whether these provisions will be availed of largely in this country.

LECTURE system in which they have been brought up, while any proposed improvement is sure to be denounced very much after the fashion long since held up to ridicule by the wittiest writer the English Church has given to the present century.

IV.

Right passing under sale.

To return: as the law at present stands, the right which passes under a sale by the mortgagee is the entire interest which the mortgagor and mortgagee could jointly sell. Where the subsequent transferees, if any, are parties, and the order for sale is made in their presence, the purchaser acquires a higher right which may be described as the entire interest which the mortgagee together with the mortgagor and his transferees could jointly convey. In the case, however, of a second mortgagee, the sale would be subject to the prior charges, (*Doolal Chunder v. Goluck Monee*, XXII Suth. W. R., 360); but if the first mortgagee is a party, as he ought to be, there is no reason why the property should not be sold free of all incumbrances, the first mortgagee having a paramount claim on the proceeds of the sale. I must, however, admit that, in practice, this is seldom if ever done. I may mention that in England, in a suit for sale, if the prior mortgagee is a party, he must be redeemed. (Spence's Equity, Vol. II, p. 671).

Relations of second to subsequent mortgagees.

It is scarcely necessary to point out that the second mortgagee stands in the same relation to posterior mortgagees that the first mortgagee does to him, and that he is, therefore, under the same obligation towards them as the first mortgagee is towards him. Thus, a purchaser under a sale by the second mortgagee, although he must, in any event, purchase, subject to the rights of the first mortgagee, acquires a very different estate accordingly as the posterior mortgagees are parties to the decree or not. If the order for sale is made in their presence, the purchaser acquires the estate absolutely as against them, but if it be otherwise, the purchase is made subject to their right to redeem.

What interest passes under sale.

I said that a sale by the mortgagee under a decree against the mortgagor conveys to the purchaser the entire interest which he and the mortgagor could jointly sell. It is necessary to point out that this refers to the interest which they could jointly pass, not at the time when the property is sold, but at the time of the institution of the suit in which the decree under which the property is sold, was made. This is a necessary consequence of the doctrine

of *lis pendens*, which I shall have occasion to discuss hereafter. I may also point out that the language of section 259 of Act VIII of 1859, was perhaps, in strictness, inapplicable to a sale by a mortgagee which takes place under a decree for sale, and not under an ordinary execution. The right, title, and interest of the judgment-debtor, of which the section spoke, were, however, understood in a somewhat wider sense than the right possessed by the debtor at the time of the sale. As I shall have occasion to explain presently, the provisions of Act VIII of 1859, like those of the present Code with regard to executions, were far from being clear as regards the rights of mortgagees.

In connection with this subject I may mention that a question may arise, but which, so far as I am aware, has not been decided, as to the precise effect of a clause against alienation contained in a deed of mortgage. Such clauses are frequently found in Indian mortgages. I have already explained that ordinarily a clause against alienation does not prevent the alienee from acquiring a title to the property. The covenant does not affect the thing itself, although in some cases the covenantor may render himself liable to an action for a breach of his contract. It would, however, seem that in the civil law a clause against alienation by the mortgagor is allowed to bind the property itself, and a subsequent alienation is therefore void. In consequence of this doctrine, the mortgagee is not bound to recognise any alienee of the property mortgaged to him, if there be a clause against alienation in the mortgage. (Burge's Foreign and Colonial Law, Vol. III, p. 197.) It seems that in some of the earlier cases to be found in the books, the doctrine was carried by the Indian Courts further than equity or good conscience would seem to justify; but it may be a question whether, in the presence of such a stipulation, a decree obtained by the mortgagee, and a sale thereunder, although made in the absence of persons who had acquired an interest in the property subsequently to the mortgage, would not pass an absolute title to the purchaser. (*Gunga Gobindo Mondul v. Benemadhab Ghose*, XI Suth. W. R., 548, cf. 549; III Ben. L. Rep., 172; *Bhanumutty Chowdhurani v. Premchand Neogy*, XXIII Suth. W. R., 96; XV Ben. L. Rep., 28.) In the absence of any distinct authority, I do not venture to offer any opinion one way or the other. I simply call attention to the point as one which must not be taken

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to be decided by the authorities as it does not seem to have been distinctly raised in any case. In *Khubchand v. Kallian Das* (I. L. R., I All., 240) Mr. Justice Turner said: "It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajaram v. Benimadhab* (N.-W. P. H. C. Rep., 1872, p. 81), in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second incumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge, and not to the personal obligation of the mortgagor; and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy, and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khubchand having purchased under a mere money-decree, the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property." (*Khubchand v. Kallian Das*, I. L. R., I All., 248).

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Kannum.*

Again, in the case of *Venkatta v. Kannum* (I. L. R., V Mad., 184) the same learned Judge observes: "Where, by a condition of the mortgage-contract, he (*i.e.* the mortgagor) engages to abstain from alienating the interest remaining in him, there is again a conflict of opinion as to the effect of the condition in respect of mortgages of immoveable property. In *Radha Prasad Jusput v. Monohar Das* (I. L. R., VI Cal., 319) it is stated by the learned Chief Justice that such a covenant, *i.e.*, an agreement restrictive of alienation, creates only a personal liability as between the mortgagor and mortgagee. On the other hand, it was held in *Chuni v. Thakur Dass* (I. L. R., I All., 126) that such a condition is operative to the extent and for the purpose contemplated by the parties, and that a transfer of the interests of the mortgagor is voidable, in so far as it is in defeasance of the rights of the mortgagee, and the decision accords with what is declared to be the general rule by Mr. Justice Macpherson. This decision may be reconciled if it be held that the condition

binds a purchaser for value only when he has notice of it, and that in the one case the purchaser had, and in the other he had not, such notice. LECTURE
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“However this may be, and the point does not call for decision in the case before the Court, it is clear that even where such a condition has been imported into a mortgage, it does not absolutely debar the mortgagor from dealing with the interest remaining in him. Where the mortgagor has transferred, in whole or in part, such interest, the transferee acquires against the mortgagee similar rights to those possessed by the mortgagor, so far as they are necessary for the enjoyment and preservation of the interest transferred to him. If the mortgagee desires to foreclose the mortgagor or to bring the property to sale, a purchaser from the mortgagor or a second mortgagee is entitled to redeem the first mortgage and thus to protect his own interest in the property mortgaged. Hence it has been held that to render a decree for foreclosure on sale effectual, the mortgagee must make subsequent purchasers or incumbrancers parties to the suit, at least if he have notice of them or circumstances exist which should have put him on inquiry as to the claim by them of an interest in the mortgaged property (I. L. R., V Mad., 186, 187.)

It is necessary to observe that at one time the Courts used to give full effect to a condition against alienation (see the cases cited by the Reporter in the note to *Chunni v. Thakoor Dass*, I. L. R., I All., 126); but it is now settled that a transfer by the mortgagor in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee to realise his security. But with this reservation, such a condition does not affect the property so as to prevent the acquisition of a valid title by the transferee of the equity of redemption. Covenants against alienation are often introduced in mortgage-deeds in this country, and I may add, are as often infringed by mortgagors. But such a covenant, although it may create a personal liability between the mortgagor and the mortgagee, does not render an alienation absolutely void, but voidable only in so far as it is in derogation of the rights of the mortgagee. In reality, therefore, a mortgagee does not, by virtue of such a covenant, acquire any higher rights than he would acquire even if the condition was absent, except, perhaps, as regards the necessity of making puisne claimants parties. (*Radha Prosad Misser v.*

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Monohur Doss, I. L. R., VI Cal., 317; *Chunni v. Thakoor Doss*, I. L. R., I All., 126; *Ali Hasan v. Dhirja*, I. L. R., IV All., 518.) But although the purchaser acquires the property in the state in which it was mortgaged, it does not follow that a lease, for agricultural purposes for instance, made by the mortgagor in the usual course of management, can be avoided by the mortgagee or a purchaser claiming under him. (*Chunni v. Thakoor Doss*, I. L. R., I All., 126.) In *Banee Pershad v. Rith Bhunjan Singh*, (X Suth. W. R., 325) in dealing with the contention that the plaintiff, as a purchaser under a mortgage-decree, took the property free from all alienations or incumbrances created subsequently to the mortgage, the Court said: "We apprehend that this proposition is not maintainable in the full sense of the words in which it is framed, if the term incumbrance is meant to include such temporary arrangements by lease or farm as the owner might find to be expedient or convenient. The mortgagor was restrained from alienating the property which he had pledged; but he was not divested of, or restricted in, the management of the property, and as long as nothing took place which impaired the value or impeded the operation of the mortgagee's lien, we think that the mortgagor in creating a temporary lease acted within his powers, and that the purchaser has no legitimate cause of complaint."

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on the
point.

In the civil law, however, as I said, a covenant by the mortgagor, that he will not transfer the property pledged by him was valid. "A stipulation by the mortgagor that he will not alienate, will prevent the alienee from acquiring a title to it. Generally, a contract not to alienate a particular thing affects not the thing itself, but merely the person contracting, so as to subject him to an action for a breach of his contract. The stipulation added to the contract can have no greater efficacy than the contract or principal to which it was accessory. It is not so with the contract against alienation by the mortgagor, for the mortgage gives a right in the property, and this contract, following the nature of its principal, affects the property, and therefore, renders the alienation of it void." (Burge's *Foreign and Colonial Law*, Vol. III, p. 197.)

Lis pendens.

I have already pointed out that the right to possession vested in the mortgagor or in a transferee of the equity of redemption passes under the first sale, and that, quite independently of the question whether the decree under

which the property was sold was obtained by a puisne mortgagee, or even by an ordinary unsecured creditor (*Ajoodhya Pershad v. Musamat Maracha Kooer*, XXV Suth. W. R., 224). This rule, however, as you have just heard, is subject to one very important qualification based upon the doctrine of *lis pendens*. If the property is sold after an action has been commenced by the mortgagee to enforce his security, and, *à fortiori*, if the sale takes place after a decree has been obtained for the sale of the mortgaged premises, the purchaser will acquire no rights whatever as against the mortgagee or a person claiming by virtue of a sale at the instance of the mortgagee. It must, however, be borne in mind that the doctrine of *lis pendens* has no application to a case in which the proceedings are taken only for the purpose of enforcing the personal liability of the mortgagor, or, in other words, where the mortgagee seeks to obtain only a money-decree. (*Bir Chunder Manikya v. Mohomed Afsarooddin*, I. L. R., X Cal., 299—the head-note of which is inaccurate, the mortgagee not having obtained a mortgage-decree as stated by the reporter, but only a decree for money.)

The provisions of the Civil Procedure Code relating to sales by mortgagees are, however, very defective; and it may, therefore, be sometimes necessary for the mortgagee notwithstanding that he has obtained a decree for sale to bring an action against a purchaser of the mortgaged property, who may have bought the equity of redemption after the institution of his suit by the mortgagee. (See the observations of Oldfield, J., in *Jagat Narain v. Jagrup*, I. L. R., V All., 452; *Pahar Singh v. Jai Chand*, N.-W. P., S. D. A. Rep. 1864, Vol. I, 543; *Mangloo v. Roghoo Nath Dass*, N.-W. P., S. D. A. Rep., 1866, 72; *Gajadhar Pershad v. Daibee Pershad*, Agra H. C. Rep., 1869, 29). It seems, however, that where the first sale takes place at the instance of a puisne incumbrancer who is not a party to the decree obtained by a prior mortgagee, the latter will be bound to bring a fresh suit against the purchaser to enforce his mortgage, as neither the puisne incumbrancer nor the purchaser to whom his lien has been transferred will be bound by the decree. (*Jagat-narain v. Jagrup*, I. L. R., V All., 452.)

In the case of *Janki Dass v. Budri Nath* (I. L. R., II All., 698), it was held that if there are two simultaneous sales in execution of two different mortgage-decrees, the

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Right of prior mortgagee to sue for re-sale of property.

Jagat Narain v. Dhundhy.

But whether a prior mortgagee is or is not bound to bring a regular suit for the re-sale of the property, there is nothing to prevent him from doing so. In the case of *Jagat Narain v. Dhundhy* (I. L. R., V All., 566), where the property having been sold by a second mortgagee it was argued that the first mortgagee not having enforced satisfaction of his decree in accordance with the provisions of sections 285, and 295, of the Civil Procedure Code by the machinery of the execution department, could not bring a fresh action to obtain a re-sale of the property, the Court said: "The first paragraph of section 295, and clauses (a) and (b) have reference only to sales in execution of simple money-decrees, and to the mode in which sale-proceeds are to be rateably distributed among simple money-decree-holders. The provisions contained in clauses (a) and (b) declare the incompetence of a mortgagee or incumbrancer, as such, to share in any surplus proceeds, arising when property is sold to his mortgage or charge. But the alternative is afforded him of consenting to the property being sold free of his mortgage and charge, in which case the Court may give him the same right against the sale-proceeds as he had against the property sold. In the case before us, the decree, in execution of which the one-anna share of Mouza Sheosara was sold, was not a simple money-decree, and, therefore, in our opinion, those portions of section 295 to which we have adverted are inapplicable. It remains to be seen whether clause (c) supports the contention of the appellants. That no doubt has reference to a sale in execution enforcing a charge; but it will be noticed at once that, in distributing the sale-proceeds, the discharge of subsequent and not prior incumbrances is alone taken into account."

Mortgagee not bound to proceed against pledge.

I will now deal with certain questions which, although properly belonging to the domain of procedure, also fall within the province of this lecture. We saw that a mortgagee, by obtaining a personal decree against the mortgagor, does not forfeit his lien upon the land. He must, however, enforce his decree by execution and is not competent to maintain a second suit against his mortgagor for the purpose of obtaining a decree for sale. (*Syed Imam Momtazuddin Mohamed v. Raj Coomar Dass*, XXIII Suth. W R., 186.)

But, as pointed out in *Junmajoy Mullick v. Das Moni Das*, a plaintiff who obtains a money-decree against his mortgagor, is not precluded from enforcing his lien by means of a second suit against the mortgaged property in the hands of a purchaser to whom the property may have been afterwards sold. (*Junmajoy Mullick v. Das Moni Das*, I. L. R., VII Cal., 714; IX Cal., 33). "These two Full Bench cases, therefore, establish that there is a difference in the procedure applicable between the case where the property is still in the hands of the mortgagor, and the case where it has passed to a purchaser, the lien being enforceable in the one case by execution, in the other by suit." (*Kally Nath Bondopadhyaya v. Kunja Behary Shaha*, per Wilson, J. (I. L. R., IX Cal., 655.) But suppose the mortgagee obtains a personal decree and allows it to be barred by limitation, can he bring a fresh suit against an alienee of the mortgagor who has purchased the property subsequently to the decree? This very point arose in the case of *Kali Nath Bondopadhyaya v. Kunja Behary Shaha* (I. L. R., IX Cal., 651), and was answered in the negative, on the ground that it would be contrary to ordinary principles to hold that the mortgagee acquires a greater right by reason of the mortgagor's alienation, or, that the purchaser takes subject to a greater burden than the debtor himself. If the mortgagee allows his decree against the debtor to be barred by limitation, he loses all right to proceed by execution against the property in the hands of the debtor, and has no better right to proceed by suit against the property in the hands of the purchaser. (I. L. R., IX Cal., 651.) I do not, however, think that the learned Judges meant to lay down any general rule, or, to deny to the mortgagee the right to abandon proceedings under his money-decree, and to proceed upon his lien against a transferee of the equity of redemption, provided, of course, his right to bring such an action is not barred by the Statute of Limitations. Although cases in which the transfer is made after the right to execute the money-decree is barred may, perhaps, be governed by a different rule. (*Chunnilal v. Banaspat*, I. L. R., IX All., 23.) Another question also relating to procedure has given rise to a conflict of opinion, it being somewhat doubtful whether a mortgagee who omits to prefer the portion of his claim which would charge the mortgaged property or who, having preferred it, accepts a mere money-decree, is entitled to bring a subsequent suit

LECTURE IV. — against a transferee for the purpose of enforcing his security on the land. Under Act VIII of 1859, such suits were frequently brought; but a doubt has been raised by the language of section 43 of the present Code of Civil Procedure which corresponds to section 43 of Act X of 1877, as amended by Act XII of 1879. (*Goomani v. Ram Podarat Lall*, I. L. R., II All., 838, where the Court held that a mortgagee who had obtained a personal decree against the mortgagor, could not afterwards bring a suit against a person who had bought the property before he brought his first suit for the purpose of enforcing his security. But see *Bahraichi v. Surju* I. L. R., IV All., 257; *Umrao v. Beharo*, I. L. R., III All., 297; *Jummajoy Mullick v. Das Money Dasee*, I. L. R., VIII Cal., 700; *Rajkishore Shaha v. Bhadoo Norha*, I. L. R., VII Cal., 781). It is scarcely necessary to point out that if a decree for sale becomes infructuous, either in whole or in part, by reason of want of jurisdiction in the Court directing the sale, the mortgagee is not precluded from maintaining a second suit for the purpose of availing himself of his security. (*Gris Chunder Mookerjee v. Ramessuree*, XXII Suth. W. R., 308; see also *Bungsee Singh v. Soodist Lall*, I. L. R., VII Cal., 739.)

Relative rights of the parties.

Difficulties have not unfrequently arisen owing to badly-drawn pleadings; and suits for possession have been sometimes brought by persons who were only entitled either to foreclose or to redeem. In some cases the Court has refused to determine the relative rights of the parties under different decrees for sale, on the ground that in a suit for possession the question is not which *mortgage* is prior, but which *sale* is prior; and as the first sale would undoubtedly carry with it the right of possession if it was vested in the mortgagor, the Court refused to determine the relative rights of the parties on their mortgages in an action of ejectment. (*Nanack Chand v. Teluck Dye Koer*, I. L. R., V Cal., 265; *Dirgopal Lal v. Bolakee*, I. L. R., V Cal., 269; *Venkatanor Shammal v. Raniah*, I. L. R., II Mad., 108; *Radhaprosad Misser v. Monohur Doss*, I. L. R., VI Cal., 317.) But, a more liberal rule has been acted upon in other cases, and our Courts have, in several instances, allowed suits for possession to be converted into suits for foreclosure or redemption. (*Massimunnessa Bibi v. Nilatan Bose*, I. L. R., VIII Cal., 79; *Chundra Nath Mullick v. Nilakanta Banerjee*, I. L. R., VIII Cal., 690—reversed on appeal, but on other

points—*Rup Chand Dugdusa v. Davlatrav*, I. L. R., VI Bom., 495; *Shivram v. Genu*, I. L. R., VI Bom., 515; *Sankana v. Virupakshapa*, I. L. R., VII Bom., 146. *Dullabhdass v. Lakshmandas* I. L. R., X Bom., 88; *Venkata v. Kannam*, I. L. R., V Mad., 184.)

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In England the practice of a Court of Equity is not to make a decree for redemption on a bill which does not pray for redemption. It is not sufficient that, taking the bill and answer together the suit appears to be in substance a suit for redemption. If, for instance, the plaintiff by his bill impeaches the validity of the mortgage-security but fails to establish his case, no decree can be made in the suit except one of dismissal, without prejudice, however, to the plaintiff's right to bring a suit with the formal object of redeeming the mortgage. (*Broughten v. Binks*, VI Ves. 573; *Martinez v. Cooper* II, Russ 198; *Gordon v. Horsfall*, 5 Moon., P. C. 393; *Inman v. Waring*, 3 DeG & Sm., 729; *Johnson v. Fesenmere*, XXV Beav., 88; and *Greaver Mining Co. v. Willyms*, 35 Beav., 353.) It is, however, not quite clear whether a Court of Appeal will set aside a decree for redemption simply on the ground that the plaintiff does not ask for redemption in his bill (But see the dictum of Lord Eldon in *Martinez v. Cooper*, II Russ., 198).

Practice of
Chancery
Court.

Circumstances may, however, occur which would justify a departure from the somewhat strict and technical rule enforced by the English Courts of Equity. It will be found that the rule is confined only to those cases in which, while, on the one hand, the plaintiff impeaches the mortgage-security, the defendant, on the other, admits his character of mortgagee, and claims no higher right. It will not apply to cases in which the mortgagee claims an absolute title. In the *National Bank of Australasia v. United Hand-in-hand and Band-of-hope Co.* (IV L. R., P. C., 391), where the plaintiff sought to recover possession of the mortgaged premises as if they were unincumbered and the defendant resisted the action, not as mortgagee in possession, but as absolute owner, and the issues disclosed by the pleadings, which were somewhat loose and informal, were not merely mortgage or no mortgage, but also whether the defendant had ceased to be mortgagee and become the absolute owner, the suit was regarded in the nature of an equitable ejectment in which each party claimed an absolute interest in the property for the profits of which

Excep-
tional cases.

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IV.

the bill sought an account. The Supreme Court of Victoria took an intermediate view of the rights of the parties, and, being of opinion that the original relation of mortgagor and mortgagee, which existed between the parties, had not been determined, directed an account of what remained due as in an ordinary redemption-suit. It was contended in appeal that the Court was not justified in making a decree for redemption, and the rule followed by Courts of Equity in England was relied upon in support of the objection. The contention was, however, overruled by their Lordships of the Privy Council. "It plainly appears," say their Lordships in giving judgment, "that the issues raised between the Company and the Bank were not merely mortgage or no mortgage, but, further, by means of its acts subsequent to the impeached mortgage, the Bank had ceased to be mortgagees and had become absolute owners." The Court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the Bank generally, or would, at least, have left its claim to more than a mere mortgage-title, subject to redemption, open to future litigation. Again, if the Company, as the Court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the right prayed for by the bill, and it was obviously necessary to direct the accounts auxiliary to that modification in order to ascertain whether, as alleged by the bill, the Bank's advances on the footing of the mortgagees had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are, therefore, of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of *Montgomery v. Calland* (XIV, Sim., 79), and the *Incorporated Society v. Richards*, (I. D. and War. 158)." What happened in the above case, happens almost in every case in this country, each party claiming to be the absolute owner, and in such cases our Courts ought to follow the rule laid down by their Lordships.

Case of por-
tion of
mortgaged
premises
converted

To return. Questions of some nicety occasionally arise where the mortgaged premises have been converted into money. Where money, for instance, is paid in as compensation for purchase of land under the compulsory

powers given by the Land Acquisition Act, the purchaser takes the property discharged of all incumbrances, and the rights of the mortgagee are transferred to the compensation-money. A similar result follows, in this country, a statutory sale for land-revenue and also, in certain cases, where the mortgaged property is a leasehold estate, a sale by the landlord for arrears of rent. (*Kali Kanto Chowdhry v. Romoni Kanto Bhattacharji*, III Suth. W. R., 227.) It has been held that in such cases the purchase-money or the surplus-proceeds should be regarded as money or personal estate, for, although impressed with the charge to which the land was subject, it cannot be said that the money is real estate: it is only to be considered as real estate. And, although it may properly be regarded in that light for the purpose of the question as to who has the best right to it, still it is, in fact, money and not immoveable property (n).

A somewhat difficult question arose in the case of *Ram Kant Chowdhry v. Brindabun Chunder Das* (XVI Suth. W. R., 246). In that case the mortgagee lent his money upon the security of certain landed property. The debt was payable by instalments, and, on one of them becoming due, the mortgagee brought an action for it and sold a portion of the property under mortgage. The judgment-debt having been discharged, there remained a surplus in the hands of the Court. Some other judgment-creditors having applied for the payment to them of the surplus proceeds, the application was resisted by the mortgagee on the ground that, by virtue of his mortgage, he possessed a lien

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into money.

*Ram Kant
v. Brinda-
bun.*

(n) It is this fact which determines the jurisdiction of the Court under section 16 of the Civil Procedure Code. (*Venkata v. Krishnasamy*, I. L. R., VI Mad., 344.) It seems to be, however, very doubtful whether the money will be regarded as personal property for the purposes of the Limitation Act, although it was assumed by the Madras High Court that the conversion of the land into money had the effect of shortening the ordinary period of limitation. (See *In re Stewart's Trusts*, XXII L. J., N. S., 369.) I may mention that the Madras case also shows that if a portion of the mortgaged premises has been converted into money, a mortgagee will not be precluded from following the purchase-money by section 43 of the Civil Procedure Code, if at the time of his bringing his action on the mortgage, he was ignorant of the conversion of the land into money. (Cf. *Kristo Dass Kundoo v. Ram Kanto Roy Chowdhry*, I. L. R., VI Cal., 142.) The last case also lays down as a settled principle that the money, which is substituted for the mortgaged land, becomes subject to the lien to which the land which it represents was subject. (Cf. *Heera Lall Chowdhry v. Janoki Nath Mookerjee*, XVI Suth. W. R., 222.) This rule, however, does not apply where the conversion is occasioned by some default on the part of the mortgagee.

LECTURE on the balance of the purchase-money for the unpaid instalments. In the meantime, the plaintiff obtained a decree for a further instalment, and the question which the Court was called upon to determine was whether the mortgagee had or had not a preferential claim on the surplus proceeds. In giving judgment for the mortgagee, the Court observed: "The money was lent upon security of certain immoveable property and was to be repaid by instalments. It might well have been that the property pledged should be of such a nature as to be incapable of division; and that the plaintiff, on one of such instalments becoming due, would have to sell the entire property. Could it be said that he would, by bringing the entire mortgaged property to sale for the recovery of one instalment, lose all lien over the surplus proceeds? Assuredly, we think, not.

It seems then to make no difference that in this case the property was capable of being divided. The question as to what portion of the property should be sold for the instalment immediately due, would be rather a question to be considered as between the mortgagor and mortgagee by the Court executing the decree, and is not a question which arises in the present suit." (*Ram Kant Chowdhry v. Brindabun Chunder Dass*, XVI Suth. W. R., 246). It may be mentioned in addition to the above reasons that the mortgagee could not well have brought a suit in the first instance, either for recovery of the money which had not then fallen due, or, for a declaration that the property was subject to a lien for the whole of the money secured by the bond, and, to have denied him a preferential claim on the surplus proceeds would have been to cut down his security contrary to the intention of the parties. (Cf. *Umra v. Behari*, I. L. R., III All., 297; cf. *Greenough v. Littler*, 14 Ch. D., 93; *Nives v. Nives*, *id.*, 649.

Joint mort-
gage by two
or more
mort-
gagors.

In connection with the law of procedure, I may mention that, where there is a joint mortgage by two or more mortgagors, the mortgagee ought to bring his action against all the mortgagors jointly, as he might otherwise be in danger of losing the benefit of his security as against those who have not been joined in the suit. (*Rai Lutchmeput Sing v. Land Mortgage Bank of India*, I. L. R., XIV Cal., 469, note; *Nuthoo Lall Chowdhry v. Showki Lal*, XVIII Suth. W. R., 458; X Ben. L. Rep., 200; *Ponnappa Pillai v. Pappurayyanganar*, I. L. R., IV Mad., 1; *Gurusami Chetti v. Samurti Chinna Manner Chetti*

I. L. R., V Mad., 37; *Chockkalinga Mudali v. Subbanaya Mudali*, I. L. R., V Mad., 133; *Hemendro Coomar Mullick v. Rajendro Lal Moonshi*, I. L. R., III Cal., 353; *Kendall v. Hamilton*, IV L. R., App. Ca., 504.) LECTURE
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It seems to me, however, that the rule of the English law, upon which the foregoing judgments were based, is a highly artificial one, and cannot safely be extended to cases arising in the mofussil Courts. The Madras High Court has in its later decisions refused to follow the rule, and I trust that when the question again arises in the Calcutta High Court, the point will be reconsidered. (See the observations of Markby, J., and of Muttaswamy Iyer, J., on the point. Cf. *Ramakrishna v. Namasivaya*, I. L. R., VII Mad., 295; *Umamahaswara v. Singaperumal*, I. L. R., VIII Mad., 376; *Sita Nath Koer v. Land Mortgage Bank of India*, I. L. R., IX Cal., 888; *Nobin Chundra Roy v. Magon Tara Dassya*, I. L. R., X Cal., 924.) It is worthy of notice that even in England the learned Judges who took part in the decision in *Kendall v. Hamilton* in the House of Lords were not unanimous, and it is, to say the least, extremely doubtful whether the decision would have been the same if the principle had not been sanctioned by the authority of a series of judgments extending over half a century.

The question as to the right of one or more of several persons to whom a mortgage has been made, to bring a suit to enforce the security, without joining their fellow-mortgagees is also, attended with some difficulty. The practice of our Courts is to allow such an action to be maintained if the other mortgagees are unwilling to join in the suit even though no case of fraud or collusion is made out; but the co-mortgagees ought in every such case to be made defendants, and the suit must be one to enforce the security as a whole; one of several co-mortgagees not being competent to maintain an action in respect only of his own interest in the joint mortgage. But the position of the plaintiff in such a suit has not been clearly defined. It has been asked, for instance: Whether the plaintiff as *dominus lites* may not forego a portion of the claim? Whether the institution of one suit would prevent any of the other mortgagees from bringing their actions? What would be the effect of the plaintiff dropping proceedings in the action? It is, perhaps, not easy to answer these questions satisfactorily, but to deny a co-mortgagee the right to maintain an

Right of one of several mortgagees to sue.

LECTURE action on the security in any case without joining the
 IV. other mortgagees, would open a wide door to fraud and
 collusion.

Suit for
 foreclosure

The inconveniences of allowing one of several joint mortgagees to bring an action of foreclosure were forcibly pointed out by Mr. Justice Fry in *Luke v. South Kensington Hotel Company* (VII Ch. D., 789). In delivering judgment the learned Judge said: "I must consider, in the first place, whether the action can be maintained as a foreclosure-action, that is to say, whether, when a mortgage has been made to three persons jointly, one of those three can foreclose the mortgage, making the other two defendants to the action. It is admitted that no precedent can be produced for such a proceeding, and it appears to me that the inconveniences of it are manifold and manifest. In the first place, it would follow that you might have as many actions pending as there were mortgagees. Take the case, with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an Insurance Company, the name of the Company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees, against the mortgagor, naming the other five as defendants on the record. Then, there are further questions which would arise at the hearing. In a foreclosure-action you may have foreclosure or sale. How is the question which it is to be, to be determined? Would the plaintiff be *dominus lites* for this purpose, so that he could dictate to the other mortgagees what relief was to be had, or must there be a struggle between the co-mortgagees as to what the nature of the relief to be had, should be? It appears to me that the inconveniences of such a course are very manifest. But, then, it is said that where there are several co-mortgagees one of them might have a bad reason for not desiring to foreclose, or, might have no reason at all. He may be content to leave things as they are, and decline to join the foreclosure-action. Such questions undoubtedly have often arisen, and, in all probability, will often arise again, and they may have to be determined in some way. But, I am of opinion that they must be determined in a separate and independent proceeding, and that the mortgagor is not to be harassed by conflicts and controversies between his mortgagees; but that the question whether an action for foreclosure shall or shall not be brought, is not

to be determined in the action for foreclosure itself. To mix up the question, whether an action ought to be brought, with that action itself, seems to me inconvenient to the last degree; and upon that ground I come to the conclusion that the plaintiff cannot maintain this action as a foreclosure-action."

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A different rule, however, was laid down by the Court of Appeal and it was held that one of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or if they have done some act precluding them from being plaintiffs. (*Luke v. South Kensington Hotel Company*, XI Ch. D., 121). The learned Judges, by whom the appeal was heard, were of opinion, that, on general principles, as well as according to the practice in Equity, such a suit was maintainable, as the plaintiff could not otherwise by any possibility obtain the relief to which he was entitled. With regard to the argument that several actions of foreclosure might be brought upon the same security, the learned Judges observed that there would be no difficulty in dealing with the case if it occurred, as the Court would stop all the actions with the exception of the first. It must, however, be remembered that in the case to which I have just referred, the co-mortgagees did not refuse to foreclose, although they were not willing to be joined as plaintiffs; and, the question as to whether one of several mortgagees can foreclose a mortgage without the consent or against the wish of the others, is, therefore, left undetermined, the Court observing that they would deal with that case when it actually arose. It is, however, not at all difficult to foresee how the question will be answered by the Court.

Whatever doubt there may be as to the right of one of several mortgagees to foreclose the mortgage when the others are unwilling to do so, there can be no doubt of his competency to enforce the security, where, from the nature of things, it is absolutely impossible for all the mortgagees to join as plaintiffs, as in the case mentioned by Lord Justice James, in which there were three mortgagees holding a joint-mortgage, two of whom became mortgagees, on their separate account, of the second and the third mortgagees of the equity of redemption. In this case, you will observe, it was absolutely impossible for the three to join as plaintiffs, because they were both mortgagees and mortgagors. The difficulty was avoided by one mortgagee

Right of a
joint-mort-
gagee to
sue.

LECTURE filing his bill, making the others interested in the equity of redemption defendants.

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The same practice is followed in this country in cases in which, and they are not of unfrequent occurrence, the equity of redemption becomes vested, either in whole or in part, in one of several mortgagees. I shall, however, discuss the question more fully in a future lecture. (As to where a suit by one mortgagee alone may lie, see *Ram Ruttun v. Umed Hossain*, N.-W. P., 1853, 91; see also the dictum of Wilson, J. in *Callynath v. Koonjo Behary*, I. L. R., IX Cal., 651.)

Mortgagee free to proceed against any property.

It was thought at one time that, even in the absence of a direction in the decree to that effect, a creditor, whose debt was secured by a mortgage, was bound to proceed, in the first instance, against the property mortgaged to him, and that he could only proceed against other properties for the deficiency, should there be any. (*Brohmoye Debea v. Baikant Chunder Gangulee*, V Suth. W. R., Mis., 52). It is, however, now settled that in the absence of an express direction to that effect in the decree, a mortgagee is under no such obligation, and that he is at liberty to proceed against any property belonging to his debtor in the same manner as an unsecured creditor. (*Luchmi Dai Soori v. Asman Singh*, I. L. R., II Cal., 213; *Purmessari Dassee v. Nobin Chunder Tarun*, XXV Suth. W. R., 305; *Fukir Bux v. Chuttordharee Chowdhry*, XII Ben. L. Rep., 513, note; XIV Suth. W. R., 209; *Kalee Pershad Singh Nundee v. Raye Kishoree Dossee*, XIX Suth. W. R., 381; *Radha Kant Roy v. Mirza Sudaput Mahomed Khan*, XXI Suth. W. R., 86, and *Hart v. Tara Prosunna Mukerjee*, I. L. R., XI Cal., 718 *Rajkishore Shaha v. Bhadoo Noshoo*, I. L. R., VII Cal., 78.) But this privilege cannot, for obvious reasons, be claimed by a mortgagee who is restricted by his decree only to proceedings against the land on which the debt is secured. (*Solano v. Moran*, IV Cal. L. Rep., 11; *Budan v. Ramchandra*, I. L. R., XI Bom., 537.) This may happen either because there was no covenant to pay, or because it could not be enforced by reason of the operation of the Statute of Limitations, or because the suit was not brought to enforce the covenant.

Limitation of the rule that mortgagee is not

It must not, however, be supposed that a mortgagee is always at liberty to proceed either against the property, or against the person of the mortgagor. There are

undoubtedly cases in which such a proceeding might operate to the serious injury of the mortgagor, and the Court executing the decree has undoubtedly a discretion to take such precaution as would prevent any injury of that kind. (*Luchmi Dye Soori v. Asman Sing and others*, I. L. R. II Cal., 213.) Thus, in one case the Court compelled the decreeholder to proceed against the mortgaged property where such property had been sold in execution at an under-value by reason of the mortgage, and purchased by the mortgagee's brother, the learned Judges observing that they were not precluded from applying equitable principles to questions arising in proceedings relating to the execution of decrees. (*Ali Muhammad v. Turab Ali*, I. L. R., IV All., 497.) So, again, in the case of *Gulab Sing v. Peminan* (I. L. R., V All., 342), the Court held that to allow a purchaser of the equity of redemption to take an assignment of a mortgage-decree, and then to levy execution upon property outside the mortgage, would be to enable the purchaser to pay himself twice over to the injury of the mortgagor.

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IV.bound to
proceed
against
pledge.

The mischiefs which would arise from permitting the mortgagee in all cases to proceed at his option, either against the property pledged to him or against other properties belonging to the mortgagor, are very clearly pointed out in the case of *Kali Dass Ghose v. Lalmohun Ghose* (XVI Suth. W. R., 306). In this case the mortgagee attempted to share in the surplus proceeds after having publicly notified his lien at the time of the execution-sale. In disallowing the claim the Court observed: "It appears to us that the decree-holder should be made to abide by his election. He interfered at the auction-sale and notified publicly that he retained his lien over the property. The consequence was that the estate, instead of being sold free of incumbrance (and it is not contended that there were any other liens upon it) was sold subject to a debt of nearly Rs. 15,000. And it can hardly be supposed that such a burthen did not considerably reduce the price bid. There is nothing on the record to show what effect Kalidas's notification had on the result of the sale; but it could hardly have been other than disadvantageous. And then, besides, if Kalidas be now allowed to give up his mortgage-lien and reimburse himself from the sale proceeds, what is the position of the auction-purchaser? He bought the rights and interests of the judgment-debtor—the equity of redemption—

LECTURE but if there be no mortgage on the estate, as there would
 IV. not be if the creditor gave up his lien, there is no equity of redemption left; and, again, if there be no mortgage, the property is unincumbered. So, it would seem that the auction-purchaser has either bought nothing, or else, instead of the equity of redemption, has bought the entire proprietary right in the estate, a right that was never put up to sale at all; and so with the debtor. If the mortgage falls, which would seem to be the case if the creditor were allowed to satisfy his decree from the sale-proceeds, how is he to get back his land? Must he bring a suit to compel the creditor-mortgagee to re-assign the mortgaged interest? It seems to us, that if the decree-holder gets what he asks, the debtor will, after having paid the entire amount of the bond, be in a very considerable difficulty, and the auction-purchaser in a most anomalous and improper position.

Cases on the
 point.

The case of *Mirza Fattah Ali v. Gregory* (VI Suth. W. R., Mis., 13) is very much in point and supports the view we have taken above." (Cf. *Byjonath v. Doochun*, XXIV Suth. W. R., 83; *Bank of Bengal v. Nundolal*, XII Ben. L. Rep., 309.)

Indeed, it does not require much argument to show that it would be extremely unjust to allow the mortgagee of a property, which is sold subject to his mortgage, to obtain the surplus-proceeds in satisfaction of his decree, as the practical effect of allowing the mortgagee to satisfy his decree out of the surplus-proceeds would enable a purchaser, who purchases and pays for only the mortgagor's interest in the property, to hold it released from the mortgagee's lien. (*Mirza Fattah Ali v. Gregory*, VI Suth. W. R., Mis., 13.)

Madras
 Case.

In *Kuppaiya Chetti v. Thasamathasi Chetti* (IV Mad., H. C. Rep., 49,) the Court refused to allow the mortgagee to obtain the discharge of the mortgage-debt due to him, out of the proceeds realised on the sale of the mortgaged property, in preference to an unsecured creditor at whose instance the sale took place, although it appears that the property had been first attached by the mortgagee, which circumstance would, ordinarily, as the law then stood, have given a preferential claim to the creditor. I may mention that the sale in this case was not made with express notice, that the right title and interest of the execution-debtor was only that of a mortgagor; but the Court, notwithstanding, refused

to allow the claim of the mortgagee. The Court observed: LECTURE
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—
 “All that has been sold in execution of the second defendant’s decree, because all that could legally be sold, is the right, title, and interest of the first defendant, the execution-debtor, and his proprietary right at the time was subject to the plaintiff’s mortgage. If then, the mortgage was a valid charge on the property before the attachment, it is unaffected by the sale, and the purchase-money cannot be treated as more than the value of the mortgagor’s right of redemption. We are, therefore, clearly of opinion, that the plaintiff’s claim is of no avail against the right of the second defendant to be paid the full amount of his judgment-debt, and on this ground the decree of the lower Appellate Court in favour of the second defendant must be upheld.” Indeed, whenever a mortgagee sedulously avoids proceeding against the mortgaged property and endeavours to satisfy his decree out of other properties, it may be safely presumed that he is seeking to gain an undue advantage over his mortgagor.

The foregoing considerations do not, however, appear to have been presented to the Court in some reported cases where the contention on behalf of the mortgagor appears to have been rested solely on section 271 of Act VIII of 1859, or rather, on the proviso contained in that section corresponding to the enactment contained in section 295 of the present Code of Civil Procedure, but which, as we shall presently see, has no real bearing on cases in which the contest is, not between a mortgagee and an unsecured execution-creditor, but between the mortgagee and his debtor. In *Fakeer Buksh v. Chutter Dhari Chowdhry* (XIV Suth. W. R., 209) the dispute being one between the mortgagor and the mortgagee as regards the right of the latter to discharge his mortgage-debt out of certain surplus proceeds which stood to the credit of the mortgagor, the learned Judges were of opinion that it was competent to the mortgagee to waive his right as such, and to come in as an ordinary execution-creditor. Indeed, the Court went much further, observing: “It was competent for the present appellant to waive his right as a mortgagee, and to bring his suit for the recovery of the money due to him upon the bond. He did bring that suit, and got a decree for the money? It is true that the decree says that the execution shall be had against the property which was pledged, and afterwards against the person. Nevertheless, it is a

Section 271
of Act VIII
of 1859.

LECTURE
IV.Mortgagee
may waive
his rights.

decree for the money which was due upon the bond; and we think it was competent for him to say: 'I am content to rest upon the decree which I have obtained, and waive the right which I have as mortgagee and, resting upon that decree, I now seek to have a share in the surplus proceeds of sale under section 271.' We think he is entitled to do that."

The proposition that a mortgagee by taking a mortgage does not place himself in a worse position than an unsecured creditor, and may, therefore, waive his rights as mortgagee, however plausible, would, I think it must be allowed, unless carefully fenced in by considerable reservations, open a wide door to fraud, of which mortgagees would not, perhaps, be slow to avail themselves and of which a fair illustration is to be found in the case of *Pormesharry Dass v. Nobinchunder Taron* (XXIV Suth. W. R., 305). It appears from the report of the case that an unsecured creditor and a mortgagee having both attached the property which was pledged to the latter, it was put up for sale at the instance of the unsecured creditor, whose debt was paid out of the proceeds and the balance remained in Court at the credit of the judgment-debtor. The mortgagee then put in an application stating that he did not wish the property to be sold in accordance with his previous application and asked that his debt might be satisfied out of the money in the hands of the court. It is impossible to avoid a strong suspicion that this application was due to some secret understanding with the execution-purchaser, and was made to benefit him at the expense of the mortgagor; but the Court notwithstanding allowed the application on the authority of *Fakeer Buksh v. Chutter Dhari Chowdhry* (XIV Suth. W. R., 209.) As I have already pointed out, the argument in both the cases was based solely on section 271 of the Civil Procedure Code and the Court was not called upon to consider the equities which arose in favour of the mortgagor.

Fakir
Bux's Case.

The observation in *Fakir Bux's Case* (XIV Suth. W. R., 209) that the mortgagee was not bound to proceed in the first instance against the property comprised in his mortgage, although the decree should say that execution should be had against the mortgaged property first, and afterwards against the person, would also seem to be open to criticism and cannot safely be regarded as a precedent. There seems to be ample authority for the position that

where a decree is so worded as to compel the mortgagee to proceed, in the first instance, against the property pledged to him, he is bound to obey the direction contained in the decree, and is not at liberty to evade it by waiving his rights as mortgagee and coming in as an ordinary execution-creditor. (*Luchmi Dye Koori v. Asman Sing*, I. L. R., II Cal., 213; *Kristo Kishore Dutt v. Rup Lall Dass*, I. L. R., VIII Cal., 687.)

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IV.

Before dismissing this subject, I will only mention that every Court has a right to prevent any abuse of its process, and that it has a discretion in executing a decree to take such precaution as might be necessary against any wanton injury to the debtor. It is true that there is no express provision on the subject in the Code of Civil Procedure; but the action of the Court in restraining the mortgagee when a proper case is made out from proceeding in an oppressive manner cannot, I presume, be fairly regarded as in any way trenching upon the province of the Legislature.

Again, the right of a mortgagee to enforce his decree against any part of the property pledged to him for the whole of the mortgage-debt, may also be controlled by equitable considerations arising out of transactions subsequent to the decree. Thus, for instance, if two villages are mortgaged as security for a debt, and the mortgagee acquires the right of redemption in one of them, he will not be permitted to levy execution for the whole of the mortgage-debt on the other village. I shall explain in a future lecture the principle on which, in the event of the mortgagee purchasing a portion of the property comprised in his mortgage, the mortgage-debt is distributed over the different parcels. What I now wish to point out is, that the court of execution is competent to determine the proportions in which the mortgage debt should be apportioned, and that, ordinarily, it is not necessary to bring a regular suit for the purpose of enforcing any equity which may arise between the parties. (*Luchmi Narain Puri v. Bikram Singh*, IV Cal. L. Rep., 294.) In this case it appears that one of two villages, upon a mortgage of which the decree-holder had obtained a decree with an order for sale, having been attached in execution of another decree was sold, subject to the first decree and purchased by the decree-holder himself who then sought to execute his decree by the sale of the first village claiming to charge the entire debt upon it. It

Right of mortgagee to proceed against any part of the pledge.

Luchmi v. Bikram.

LECTURE IV. was contended on the other hand by the mortgagor that the village which had been bought by the mortgagee should be first resold, and that the other village should be sold only in the event of there being a balance unrealised by the sale of the first village. The Court was of opinion that both parties were equally wrong in their contentions. The mortgagee was clearly bound to give credit for the share of the debt assignable to the village, which had been bought by him, while the purchaser on his part was not entitled to demand a resale. The Court accordingly directed that an account should be taken of the relative values of the mortgaged properties and the debt distributed in accordance with such valuation; the mortgagee being at liberty to proceed to execute his decree for the sum chargeable upon the second village by the sale of that village.

*Naser v.
Baikanto.*

In another case, however, reported in the same volume of the Calcutta Law Reports, a different course was adopted. It appears that a decree had been obtained upon a mortgage against two judgment-debtors who were the joint owners of a certain village. Before execution had been taken out by the mortgagee, the share of one of the judgment-debtors in the village was sold subject, however, to the mortgage. The purchaser, in order to protect the share bought by him, took an assignment of the mortgage-decree and proceeded to execute it against the remaining share. He was met by an objection on the part of the judgment-debtor that the transaction which had taken place between him and the mortgagee, amounted to a satisfaction of the decree, and, by the further objection that the effect of the transaction was to place him in the position of a judgment-debtor who had purchased the decree and that the decree was, therefore, incapable of execution. But the Court thought, that the result of the purchase was not to make the assignee a judgment-debtor or a quasi-judgment-debtor, but only to put him in the place of the original mortgagor. All that he had done was to purchase the decree in order to protect the property which he had bought from being sold under the mortgage-decree. But as transferee of the decree, he was entitled to execute the decree against the defendant personally, and also, in the event of his making default, in paying the amount to go against the remainder of the property mentioned in the decree. "It may be," the court observed, "if the decretal money has to be realised by the sale of the last mentioned property, an equity may

arise as between the appellant and defendants to have the decretal money distributed over the whole of the property mentioned in the decree, and to have the share of the mehal bought by the appellant at the Government sale, contribute its proportionate part of the decretal money. But if such an equity exists, I think it must be asserted in an independent suit. At all events, the existence of such an equity, supposing it to exist, is no bar to appellant now proceeding against (*sic*) to execute the decree." (*Naser Chunder Mundal v. Baikanto Nath Roy*, IV Cal. L. Rep., 156.)

The case, therefore—which I may mention, in passing, was heard *ex parte*—can scarcely be regarded as distinct authority for the proposition that an assignee of a mortgage-decree having an interest in a portion of the mortgaged premises, is entitled to proceed for the whole amount of the debt against the remainder. But it is undoubtedly authority for the position that such assignment has not the effect of satisfying the decree, and this is so, not because, as is sometimes thought, a decree upon a mortgage is not a decree for money, but because the assignee was never personally liable for the debt, and this seems to be the real ground of the decisions on the point. (*Lalla Bhagun v. Holloway*, I. L. R., XI. Cal., 393; *Yakoob Ali v. Ramdulal*, XIII Cal. L. Rep. 272).

In this connection I may mention that a decree upon a simple mortgage is regarded for many purposes as a decree for money; and it is none the less a decree for money, even though other relief is given by the decree. (*Hart v. Tara Prosunno Mookerjee*, I. L. R., XI Cal., 718, and the cases cited therein.) But some of the provisions of the Civil Procedure Code regulating the mode of execution of decrees for money, are obviously inapplicable to a decree upon a mortgage which directs the sale of the pledged property in pursuance of a contract specifically affecting such property. (*Womda Khanum v. Ramroop Koer*, I. L. R., III Cal., 335; *Bhagwan Prasad v. Sheo Sahay*, I. L. R., II All., 856; *Bhagvan v. Hati Bhai*, I. L. R., IV Bom., 25; *Binda Prasad v. Madho Prasad*, I. L. R., II All., 129; *Hardeo v. Hukam*, I. L. R., II All., 320; *Bachu v. Madad Ali*, I. L. R., II All., 649. Cf. *Shankarapa v. Danapa*, I. L. R., V Bom., 604; where the words "attachment or sale by any process of any civil court in Bombay" (Act V. of 1862) were held to prevent attachment

Decree upon a simple mortgage a decree for money.

LECTURE and sale under simple money-decrees, and not a sale in satisfaction of a mortgage-decree (o).

IV.

Right of Court to restrain mortgagee in case of collusion.

I may here mention, that in one case the Court restrained the mortgagee by its decree from enforcing his mortgage against any property, comprised in the mortgage for the whole of the mortgage-debt. There was in that case a very strong suspicion of collusion between the mortgagor and the mortgagee for the purpose of throwing the whole burden of the mortgage-debt on a portion of the pledged property which had passed under an execution-sale against the mortgagor into the hands of a third person. The Court by its decree directed an apportionment of the mortgage-debt between the different properties and enjoined the mortgagee from taking out execution against the property, which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property without satisfying the court that he had made every possible effort to execute the remainder of his decree against the other properties (*Ramdhon Dhur v. Mohesh Chunder Choudhry*, I. L. R., IX Cal., 46). The case is an apt illustration of the anxiety of our courts to prevent fraudulent or oppressive conduct on the part of a mortgagee; but it can scarcely be regarded as a precedent.

Section 287 of the Civil Procedure Code,

Before dismissing the question of fraud, I must mention that a mortgagee who causes the property pledged to him to be sold in execution, cannot afterwards set up his mortgage against that property unless he shows that the purchaser bought with notice of his claim; and it seems that the mere fact that, at some time or other, the mortgagee informed the Court by which the property was sold of his mortgage, is not evidence that the purchaser bought with notice. (*Dullab Sircar v. Krishna Koomar Bukshi*, 3 Ben. L. Rep., 407; XII Suth. W. R., 303; *Doole Chand v. Mussammat Omda Begum*, XXIV Suth. W. R., 263; *Tuka Ram Bia Athmarum v. Ram Chunder*, I. L. R., I Bom., 314; *Nursing Narain v. Roghoobur*, I. L. R., X Cal., 609.) Section 287 of the present Civil Procedure Code expressly requires that every incumbrance to which the property is

(o) No attachment is necessary in the case of a mortgage-decree; the direction in the decree itself is sufficient authority for the sale (*Dayachand v. Hemchand*, I. L. R., IV Bom., 515; *Venkata v. Ramiah*, I. L. R., II Mad., 108; *Defholts v. Peters*, I. L. R., XIV Cal., 631; see also Rule No. 349 of 1887, unreported, by MITTER and BEVERLEY, JJ.

liable, shall be inserted in the sale-proclamation, and where the mortgagee has the carriage of the proceedings, it would be manifestly inequitable to allow him to enforce a mortgage not inserted in the proclamation against a purchaser; but the mortgagee is not bound to go out of his way, if the property is about to be sold by a third person, to inform the Court of his mortgage on pain of being afterwards unable to enforce his claim. The subject, however, belongs to the larger question of estoppel by conduct; and to discuss the question adequately would carry me much beyond the limits of the present lecture. I shall, however recur to it when I come to treat of the extinction together with the priority of mortgages. (See Lecture XII.)

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IV.

I will now call your attention to section 295 of the Civil Procedure Code, a not very favourable specimen of legislative workmanship. That section says:

Section 295
of the Civil
Procedure
Code.

“Whenever assets are realised, by sale or otherwise, in execution of a decree, and more persons than one have, prior to the realisation, applied to the Court by which such assets are held, for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realisation, shall be divided rateably among all such persons:

“Provided as follows:—

“(a) When any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not, as such, be entitled to share in any surplus arising from such sale;

“(b) When any property is liable to be sold in execution of a decree, is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold:

“(c) When immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

“First, in defraying the expenses of the sale;

“Secondly, in discharging the interest and principal money due on the incumbrance;

“Thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and

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IV.

"*Fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

"If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

"Nothing in this section affects any right of the Government."

How construed.

Now, the first observation which I wish to make on this section is that the proviso being annexed to a section which gives certain rights to execution-creditors must be taken to refer to a mortgagee who is also an execution-creditor. Its language also clearly points to a case in which there are assets and there are rival judgment-creditors among whom they have to be distributed. The section has, therefore, as, I have already had occasion to point out, no application to a case in which the mortgagee is the only creditor who seeks to be paid out of any surplus proceeds which may be in the hands of the Court as money payable to the mortgagor. (*Purmessuree Dossee v. Nobinchunder Tarun*, XXIV Suth. W. R., 305.) It does not, however, follow, as we have already seen, that the court may not, apart from the provisions of the Civil Procedure Code, restrain the mortgagee from proceeding against such assets, representing, as we must assume that they do, the value only of the equity of redemption. But the section positively prevents the mortgagee from obtaining a rateable distribution with the unsecured creditors if the property is sold subject to his mortgage. A question may, however, arise whether in a contest between a mortgagee and unsecured creditors, where the money in the hands of the Court is not sufficient to pay all the creditors in full, the mortgagee may not waive his rights under his mortgage after the sale has taken place, and insist upon sharing in the purchase-money as an ordinary creditor. You will observe that in such cases considerations arise somewhat analogous to, but of a slightly different nature from, those which would arise if the contest was solely confined between the debtor and the mortgagee. The law seems to be anxious to guard against a wanton sacrifice of the rights of the unsecured creditors, and, on a principle based on natural equity which I shall explain at

some length in a future lecture, the mortgagee is not permitted to share in the purchase-money which we must not forget, is paid only for a partial interest in the estate, that is, the equity of redemption. The mortgagee possesses in his mortgage ample security for the realisation of the debt due to him and his rights are not in any way prejudiced by a refusal to give him a share of the proceeds; while very grave injustice might be done, both to the other creditors and the mortgagor, if the unsecured creditors could be disappointed by the action of the mortgagee. It seems to me that the section has been enacted for the protection of the unsecured creditors, and the doctrine of waiver, therefore, would not apply. It is true, there are certain expressions in the judgment of the court in *Fakir Bux v. Chutter Dhari* (XIV Suth. W. R., 209) which may seem to support a contrary view. But I venture to think, notwithstanding the very high authority of the learned judge by whom the judgment was delivered, that the *dictum* cannot be supported as laying down an inflexible rule.

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IV.

It may be said that neither the disappointed creditors nor the mortgagor would be wholly without a remedy, in case a portion of the purchase-money was paid away to the mortgagee as they would be entitled to the benefit of the lien to the extent to which it might be reduced by the conduct of the mortgagee, and that the conflicting equities between the parties might be worked out in an action properly brought for the purpose. But such a proceeding, besides being wholly unknown in the mofussil, would only lead to a perfect waste of litigation which, however, may be easily avoided without trenching upon the domain of the Legislature. I am also not insensible to the force of the argument founded on the well known maxim *expressio unius est exclusio alterius*; but I cannot persuade myself that the Legislature intended to take away all discretion from the court as to the mode in which its decrees should be enforced (*p*).

Remedies
for mort-
gagor.

The question as to what is meant by "sold subject to a mortgage" has again given rise to considerable

Sale of
property

(*p*) I confess that the introduction of the words "as such" in proviso (*a*) to section 295 which were absent from the former Civil Procedure Code are likely to create some embarrassment, and the probability is very great, indeed, that the addition of these words is due to the judgment of the Calcutta High Court in *Fakir Bux v. Chutterdhari Chowdhry* (XIV Suth. W. R., 209), to which I have had already occasion to refer.

LECTURE discussion. In the case of *Fakir Bux v. Chutterdharee*
IV. *Chowdhry* (XIV W. R., 209-10), the Court observed:

subject to
mortgage.

"We think that section 271, Act VIII of 1859, or rather the proviso in that section, is intended to apply to a case where the property is actually sold subject to a mortgage, and where the transaction is such that the purchaser is buying the property subject to the mortgage, where he is, in fact, only buying the equity of redemption which remains in the judgment-debtor; and it does not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser. This appears to have been the view taken by this Court in a decision reported in VI Suth. W. R., Mis. Rul., 13.

Section 271
of Act VIII
of 1859.

"There the Court says: 'It is not equitable that the purchaser who purchased and paid for only the mortgagor's interest in this property, should hold it released from Gregory's lien.' Now, here it does not appear that the sale to the purchaser was in fact subject to the mortgage. By 'in fact' we mean that it was not so subject by the contract of sale, and there was merely a legal right existing which might be capable of being enforced. It seems that a petition which was presented by the present appellant was not taken notice of, and neither in the proclamation of sale, nor in any of the sale proceedings, is mention made of the existence of any mortgage. Nor is there anything to show that only a limited right of the judgment-debtor was to be sold. Therefore, upon that construction of section 271, we should say that the proviso does not apply to the present case" (q).

It would, therefore, seem that the mortgagee may, even without waiving his rights as such, claim a share of the purchase-money, disappointing to that extent the unsecured creditors, although the purchaser bought with full knowledge that the property was subject to a mortgage and that all that the Court sold or was authorised to sell was only the mortgagor's right of redemption, and although the purchaser paid a price regulated by the value of such interest. It seems to me, however, that the words 'sold subject to mortgage' may be read in a less narrow sense, without doing violence to the language of the section, as

(q) As to the former state of the law on the subject, see *Woomasoon, daree v. Chowdhry Rughonath*, S. D. A., 1860, Vol. II., 35; *Sheobaksh v. Sheochurnlal*, S. D. A., 1858, p. 498; *Karorial v. Dataram*, S. D. A., 1857, p. 953.

embracing cases in which the property which is sold is, in fact, subject to a mortgage, although owing to insufficient information or other causes, the property is not sold by the Court expressly subject to the mortgage. You must remember that an execution-purchaser ordinarily buys what the judgment-debtor himself could have honestly sold, and we are therefore, not embarrassed by considerations which might arise in the case of a *bonâ fide* purchaser for value without notice of any subsisting mortgage. If, indeed, the contest was one between the mortgagee and a third person who had induced an honest purchaser to lay out money in the *bonâ fide* belief, that he was purchasing the property free of all incumbrances, a narrower construction might be supported on the ground that it tended to prevent a circuity of action, for, the consequence of refusing the mortgagee to share in the distribution, would be to throw him upon the mortgaged property, with the further consequence that the purchaser would have a right to compel the unsecured creditor to refund a portion of the purchase-money equal to the amount of the mortgage-debt. The principle is well illustrated by the judgment of the Privy Council in the case of *Douglas v. The Collector of Benares*, in which the defendant, with full notice of the plaintiff's mortgage, having sold certain property as unincumbered, the plaintiff brought an action against the defendant, claiming to be entitled to the sale-proceeds by virtue of his mortgage. Their Lordships held that the plaintiff had a clear equity against the proceeds in the hands of the defendant and this, upon the most obvious principles of moral justice, recognised and acted on as safe grounds of decision by the Court of Chancery in England. With reference to the argument that the defendant only sold the interest of the debtor and did not guarantee the title, their Lordships say: "This may be very true, but it has no bearing upon the present case. Here the Government officer, having notice of an incumbrance, which is only an equitable charge on the property, suppresses all mention of it in the advertisement of sale and conveys away the estate to the purchasers as unincumbered, and receives the full value as if it were free from mortgage. Can there be a clearer equity to call for repayment? or could there be a grosser injustice than to sue the purchasers if, indeed, against them any case could be established, which is very doubtful?" (*Douglas v. The Collector of Benares*, V Moore's Ind. App., 296).

LECTURE
IV.Defence of
bonâ fide
purchase
for value
without
notice not
available.*Douglas*
v.
Collector of
Benares.

LECTURE

IV.

Roman law
on the
point.

It is instructive to notice that a similar principle is recognised in systems founded on Roman law. Thus, it is stated by Mr. Burge in his *Foreign and Colonial Law*: 'It has been already observed that the price obtained by the debtor from the sale of the mortgaged property is not subrogated for the property sold, and, therefore, is not subject to the mortgage. The action *in rem* could, therefore, according to the strictness of the law, be instituted only against the last possessor of the property, if it had passed through many hands. It was, however, decided by the Supreme Court of Holland on principles of equity, and to avoid circuitous litigation and its consequent expense, that the creditor could resort to the first possessor to recover the price, if it were made to appear that the fourth possessor could sustain an action for the eviction against the third, the third against the second, and the second against the first.' (*Burge's Foreign and Colonial Law*, Vol. III., pp. 224-25.)

Section 295
of the Pro-
cedure
Code how
construed.

Another difficulty which was felt in construing the corresponding section of the Civil Procedure Code of 1859, is also likely to arise on the language of section 295 of the present Code of Civil Procedure, which makes no exception in favour of a mortgagee when the property pledged to him is sold by the Court under a decree for sale. According to the strict wording of the section, a mortgagee would be in no better position than an unsecured creditor, the assets being liable to be rateably distributed among all the execution-creditors whether mortgagees or not. It cannot, however, be denied that when the property is sold at the instance of the mortgagee, his claim should be preferred, and yet the language of the section would seem to leave no discretion to the court of execution in the matter. The rule, however, is one merely of procedure, and cannot alter or limit the rights which a person may have acquired by contract, independently of the rules embodied in the Code of Civil Procedure. (*Raj Chundra Shaha v. Hur Mohun Roy*, XXII Suth. W. R., 98; *Harsoon Arra Begum v. Jawadoonnissa Satooda Khandan*, I. L. R., IV Cal., 29). It seems to me that the whole Chapter on Execution in the Civil Procedure Code relates to sales in execution of decrees for money, and not to sales under mortgage-decrees. The same defect was noticed in the old Code, but has not yet been rectified by the Legislature.

A question of some nicety upon the construction of section 295 of the Civil Procedure Code arose in the case of *Siva Ram v. Sookrah Manya* (I. L. R., IX Mad., 57). It appears that certain land was mortgaged to the defendant to secure the repayment of a loan of Rs. 2,000 and interest. The mortgagee was to be let into possession, it being stipulated in the deed that the interest on the debt should be paid out of the profits and the balance paid to the mortgagors. By a subsequent agreement, however, it was arranged, that the mortgagors should remain in possession and pay an annual rent, equal to the interest payable to the mortgagee. The mortgagee obtained a decree for Rs. 2,000, and arrears of rents and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855. A puisne mortgagee applied to the Court for payment to him of Rs. 500 out of this sum, alleging that the first mortgagee was entitled only to Rs. 2,000, and Rs. 280 costs, but not to arrears of rent in preference to his claim as second mortgagee. It was contended on behalf of the first mortgagee that he was entitled to treat the arrears of rent as interest; but this contention was overruled. The Court said: "The appellant, as second incumbrancer, is clearly entitled to the surplus proceeds after discharging the principal and any interest which may be due on the respondent's incumbrance. The question between them, therefore, resolves itself into this: Can the sum claimed by the respondent as rent, and paid to him under the decree for rent, be regarded as interest due on his incumbrance? It appears to us that it cannot; and indeed both the lower courts have treated it as rent and not as interest. By letting the mortgaged properties to the mortgagors under the stipulation that they should pay rent in lieu of interest, the respondent elected to convert the interest into rent. No doubt such a course has its advantages; but he is not entitled to those advantages, and also to the advantage of treating the sum conditioned to be paid as if it were interest. He sued for it as rent, and not as interest; and under the terms of the decree, directing the sale of the property, the sum now in question was awarded to him as rent. There is no foundation for the contention that the arrears of rent are a charge on the land as against an incumbrance (I. L. R., IX Mad., 60) (r).

(r) The judgment, however, is scarcely consistent with the decision of Jessel, M. R., in *Isherwood*. Exp. (XXII., Ch. D., 384), in which it was

LECTURE
IV.*Madhusudan v. Mukundloll.*

I have already said that a sale by an unsecured creditor passes only the equity of redemption. There may, however, be cases in which the purchaser would acquire a higher right. Thus, for instance, in the case of *Mudhusudan Sing v. Mukundloll Sahoo* (XXIII Suth. W. R., 373), where execution was taken out by one of the creditors against an estate which was subject to a mortgage in favour of another creditor, who also had placed an attachment on the property, and the property was subsequently sold at the instance of the first creditor, but without any mention of the mortgage, it was held by the Court that what passed to the purchaser under the sale was not the bare equity of redemption, but the property itself, free of the mortgage held by the other creditor; and the case of *Nadir Hussen v. Baboo Pearoo* (XIX Suth. W. R., 255), lays down still more broadly that when an estate is sold pending an attachment by the mortgagee, the lien is transferred from the property to the purchase-money, and the purchaser acquires the property discharged from the lien. (See also *Raj Chundra Shaha v. Horimohun Roy*, XXII Suth. W. R., 98; but see *Janaki Bullav Sen v. Jahoruddin Mahamad Aboo Ali Sohor Chowdury*, I. L. R., X Cal., 567; *Stowell v. Ajudheya Nath*, I. L. R., VI All., 255.) The rule laid down in *Mudhusudan Sing's* Case is likely to prevent, in some measure, the evils which attend most sales in execution in this country, it being by no means an uncommon thing for the same property to be sold successively four or five times, first, perhaps, by an unsecured creditor, and then by the mortgage-creditors of the debtor; the third mortgagee probably coming in first, then the second mortgagee, the first mortgagee closing the scene; and this, although execution had been actually taken out and the property attached by the different creditors, before it was sold at the instance of the unsecured creditor.

Right of
simple
mortgagee
a real
right.

I will conclude the present lecture with a few general observations on the security to which the mortgagee becomes entitled under an ordinary simple mortgage. Now, it is necessary to bear in mind that a simple mortgage creates a real right, and that the defence of purchase for value without notice is not, therefore, applicable to a suit by a mortgagee to enforce his security.

held that notwithstanding the insertion of an attornment clause in a mortgage-deed, the real relation between the parties is not that of landlord and tenant, but mortgagee and mortgagor. Cf. *Venkata v. Keshaba*, I. L. R., II. Mad., 187.

If I sell my property to you to-day, and sell it again to a third person to-morrow, it cannot be denied that the second purchaser, although he should buy without any notice of the sale to you, will have no defence to an action of ejectment brought by you. But the case would be different if I only agreed to sell, and did not actually convey the property to you; you would then acquire a right not *in rem* but only *in personam*. But equity holds the conscience of a purchaser with notice bound by the agreement, thus engrafting an exception on the rule that a mere right *in personam* is not enforceable against third persons; but equity stops there, and does not extend the exception against a purchaser for value without notice. The doctrine of the Court of Chancery, instead of derogating in any way from the rights of a person who claims under a conveyance, and not under a contract, rather invests a person, in certain cases, whose title depends entirely upon a contract, with the same rights as if he had obtained an actual conveyance; but it does so only as against a purchaser with notice. Thus, for instance, if some solemnity, which is deemed by the common law to be essential to the validity of a conveyance, is omitted, the document will be unavailable as a conveyance; but equity would treat it as an agreement which it would enforce, not only against the person who entered into the transaction, but also against a volunteer or a purchaser with notice. (See Austin's Jurisprudence, Vol I, 377.) I have already endeavoured to explain the origin of this doctrine, and will here only add that, as a general rule, the defence is not allowed when the right sought to be enforced is a legal right, and not one which is recognised only by equity. (Snell's Equity, pp. 23—30). It does not fall within the province of these lectures to explain the doctrine at length, and if I recur to it, it is only because its somewhat indiscriminate application in this country has attracted to it a cloud of prejudice much of which, when kept within reasonable limits, the doctrine certainly does not deserve. The real truth seems to be, that the doctrine is in some measure a "survival," and points to times when a conveyance was a transaction which could never take place secretly, while a mere agreement was not attended with any such publicity. In these days, when the title to real property passes by mere writing, or even by word of mouth, a conveyance may be attended with as little publicity as an agreement to transfer at a future time, and it is this feeling, apparently, which has

LECTURE sometimes led to the extension of the doctrine to real rights
IV. In all enlightened systems of jurisprudence, however, the somewhat cumbrous formalities which our forefathers insisted upon as a protection against fraudulent practices, are gradually giving way to a system of registration of assurances.

Security
available
against
purchaser
for value
without
notice.

The question whether a security is available against a purchaser from the mortgagor without notice of it, was raised in the Calcutta High Court in the case of *Moharajah Moheshur Bux Singh Bahadoor v. Bhikha Chowdhry*, (V Suth. W. R., 63) and was answered in the affirmative. Sir Barnes Peacock, in giving the judgment of the Full Bench, observed: "As to the *second* ground which has been raised for our opinion,—namely, that the purchaser under the bill of sale was a *bond fide* purchaser without notice, and, therefore, entitled to priority,—if the bond was really and *bond fide* executed before the date of the defendant's purchase, it would *prima facie* be entitled to priority, and the defendant could not, according to the decision in the case of *Vardon Seth Sam v. Luckpathy Royjee Lallah* (Marshall's Reports, p. 461), succeed without proof that he was a *bond fide* purchaser for value without notice. But, even if the defendant were to satisfy the Court upon that point, he would not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of his bond. If he was not bound to register it in order to retain priority over subsequent purchasers for value, I do not see what notice he could give, or was bound to give. The mere charge upon an estate does not give a right to the possession of title-deeds; and even if it would, the plaintiff in the present case had a charge, not upon the entire estate, but only on one or two villages, which would not give him a right to the possession of the title-deeds to the whole estate.

"But if the defendant should prove that he was a *bond fide* purchaser for value, he would throw the onus on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase." See also *Golla Chinna v. Kali Appiah*, IV Mad. H. C. Rep. 434; *Sadagopa v. Ruthna*, IV Mad. H. C. Rep., 457) (s).

(s) It seems that in the systems which are founded on the civil law, a purchase in good faith and for a valuable consideration, is no defence to a suit by a mortgagee to enforce his security. If the property comprised in a special mortgage were transferred to a purchaser for a valuable

Mr. Justice Campbell, who was of a different opinion, pointed to the "frightful consequences which may result if it be established as law that a lien on real property, without either publication or possession, will suffice to defeat the most cautious purchaser." "I should fear," adds the learned Judge, "that in this country the result would be an entire insecurity of title; that it would be impossible for any man by any amount of caution to buy real property with any confidence or any security that secret lien-holders may not start up with documents (or, possibly, even asserting verbal engagements) proved, as proof here goes, and which he cannot disprove, and may defeat or harass him." (V Suth. W. R., 67.)

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It is impossible to deny that there is a good deal of truth in these observations. In countries where the Roman doctrine of hypothecation obtains, the evil is guarded against by the device of public hypothec books, and the same purpose is served by the new system of registration which has been introduced into this country since the passing of Act XV I of 1864.

The fact that hypothecation confers a right *in rem* seems also to have been overlooked in some of the earlier cases on the Statute of Limitations, in which it was held that a mortgagee was bound to enforce his security within the time prescribed for suits for breaches of contracts. (*Seetul Singh v. Baboo Sooraj Bux*, VI. Suth. W. R., 318, since overruled. See *Sarwar Hossein v. Shazada Golam Mohamed*, IX Suth. W. R., 170.) In the last case it was held that a suit to enforce a security, is a suit to recover an interest in immoveable property within the meaning of clause 12 of the first section of Act XIV of 1859. It must not, however, be understood that the like extended period was allowed to the mortgagee to sue on the covenant which had to be enforced within the same period as any other contract. (*Munnoo Lall v. Pique*, X Suth. W. R., 379; *Pearee Mohun Bose v. Gobind Chunder Auddy*, X Suth. W. R., 56.) Act IX of 1871 in Article 132, Schedule ii, expressly provided for suits "for money charged upon immoveable property and the period of limitation was twelve years from the time when the money became due. It was, however, long

Period
within
which
security
must be
enforced.

consideration *bonâ fide*, even although he had no notice of the existence of this mortgage, it still remained liable to the mortgage (Burge's Foreign and Colonial Law. Vol. III., p. 200). But not so in the case of a general mortgage. (Cf. *Ramsidh v. Balgovind*, I. L. R., IX All., 158.)

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doubtful whether, as under the old law, the remedy on the covenant must not still be sought within the period prescribed for contracts. The doubt was at length set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin v. Kalka Pershad* (L. R., XII I. A., 12; I. L. R., VII All., 502). Act IX of 1871 has been replaced by Act XV of 1877, and the phraseology of the Article somewhat altered; and it has been held that the language of the present Act leaves no room for doubt that the longer period is not applicable to an action on the covenant (*t*). (*Miller v. Rungo Nath Moulick*, I. L. R., XII Cal., 389; *Sheshayya v. Annamma*, I. L. R., X Mad., 100.)

I may, however, mention that a different view has been taken of a similar section in the English Statute. In *Sutton v. Sutton* (XXII Ch. D., 511) it was held that the limitation of twelve years imposed by the Real Property Limitation Act of 1874, section 8, on actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage-deed as well as to the remedy against the land. It is true that in that case it was argued that an action on the covenant could be brought after a suit against the land was barred, but I do not think that that ought to make any difference. The Court said that they could not read the words "sum of money secured by any mortgage," not as meaning a sum which is secured, but a sum of money so far as it is secured. That would be construing the language of the Act in a non-literal sense, there being no reason whatever why the Court should not keep to the plain words of the Statute. I must confess that the Court in coming to this conclusion, gave some reasons which would not apply to the Indian Limitation Act, but at the same time they had to face a difficulty created by the preamble of the English Act which is altogether absent from our Statute. (Compare XXII Ch. D., p. 579; see *Khemji Bhagvandas v. Rama*, I. L. R., X Bom., 519.)

The difficulties which have been felt in England as to the period for which arrears of interest are recoverable together with the distinction between suits for redemption by the mortgagor and actions or suits by the mortgagee, have not arisen in India, where it has been held that the period of limitation applicable to the principal is also

(*t*) See, further, on the subject of limitation generally, App., Statutes tit., Limitation.

applicable to arrears of interest. (*Gunput v. Adarji*, I. L. R., III. Bom., 312; *Davani v. Ratna*, VI Mad., 417; *Baldeo v. Gokul*, I. L. R., I. All., 603.)

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A fresh difficulty has, however, been created by the provisions of section 147 of the present Act, the language of the Statute making it extremely difficult to say whether a suit for sale by a simple mortgagee comes under the sixty or twelve years' rule (u). (*Aliba v. Nanu*, I. L. R., IX Mad., 218; *Khemji Bhagvandas v. Rama*, I. L. R., X Bom., 519; *Shib Lal v. Ganga Prasad*, I. L. R., VI All., 551; see also *Girwar Singh v. Thakur Narain*, I. L. R., XIV Cal., 730 (F. B.); cf. *Govind v. Kalnak*, I. L. R., X Bom., 592; distinguish *Ramsidh v. Balgovind*, I. L. R., IX All., 158.)

It follows from what I have said as to the nature of the right created by a simple mortgage, that a suit to enforce a mortgage on land must, like any other suit for land, be brought in the Court within whose jurisdiction the land is situated, although the remedy on the covenant may have to be sought in a different forum. There is indeed a case at IX Bom. H. C. Rep., 12, (*Yenkoba v. Rambhaji*), in which a different view is taken; but, I presume, it cannot be supported.

Court in
which
mortgagee
must sue.

It is one of the cardinal principles of law that the *forum sitæ* is the only one in which all rights concerning land must be tried; and this principle has been adopted by the Legislature in our Civil Procedure Code. It is true that the English Courts sometimes indirectly deal with rights in foreign land by affecting to act *in personam*. Thus the English Court of Chancery assumes jurisdiction to make a decree for foreclosure of lands outside the country, on the ground that a foreclosure-decree is only a decree *in personam*, depriving the mortgagor of his personal right to redeem. But this jurisdiction, which rests upon a somewhat doubtful basis, has been disclaimed by our Courts in which a decree, whether for sale or for foreclosure, has been almost uniformly regarded as a decree *in rem*, and, therefore, incapable of being made in any Court other than that within whose local limits the land is situated. (*Bebee Jaun v. Mirza Mahomed Hadse*, I Ind. Jur., N. S., 40; *Chetti Gaundan v. Sundaram Pillai*, II Mad. H. C. Rep., 51; *Guneswar Dass v. Mahabar Singh*, I. L. R., I Cal.,

(u) As to what constitutes a simple mortgage, see notes to sec. 58 of the Transfer of Property Act.

LECTURE IV. 163; *Sree Matty Lall Money Dasse v. Jadu Nath Shaw*, I Ind. Jur., N. S., 319; *In the Matter of S. J. Leslie v. The Land Mortgage Bank of India, Ltd.*, VIII Suth. W. R., 269; IX Ben. L. Rep., 171; *Mussamut Amidi v. Debi Prosad*, XVII Suth. W. R., 287; *Begum Mahomed Khalil v. Mussamut Sona Koer*, XXIII Suth. W. R., 123; *Bul Deo Doss v. Mussamut Mul Koer*, II All. H. C. Rep., 19. Compare *Syed Nadir Hossain v. Pearoo Tafildarinee*, XIV Ben. L. Rep., 425, note; XIX Suth. W. R., 255; *Raghunath Doss v. Kakan Mal*, I. L. R., III All., 568. Compare *Sarup Chunder Guha v. Amirun Niess Khatoon*, I. L. R., VIII Cal., 703. Private International Jurisprudence by J. A. Foote 120—137. See also as to the proper forum in which to recover a debt made a charge on foreign territory, *Doss v. Secretary of State for India*, L. R. XIX Eq. 507—535).

Conflicting decisions.

As the law was understood before the Full Bench Ruling in *Haran Chundra Ghose's Case* (XXIII Suth. W. R., 187), it was of the utmost importance to the plaintiff to bring his suit in the proper Court, as no other Court than that within whose jurisdiction the land was situated could make a decree for a sale of the mortgaged property; and this declaration was as a rule sought by the mortgagee, although the mortgagor had not in any way parted with his interest in the property, either by a sale or a second mortgage. It is true that, according to the recent authorities, a mere money-decree is, as between the parties, as good as a decree for sale; but the mortgagee would certainly act prudently in expressly asking for the usual decree for sale, which, as I have already explained, can only be made by the Court within whose local limits the land is situated.

Question of pecuniary jurisdiction.

Besides questions of territorial jurisdiction, as it is called, questions of pecuniary jurisdiction also sometimes arise in suits to enforce a mortgage-security. The general rule, no doubt, on the subject is that the value of the subject-matter in dispute determines the forum in which the action should be brought. In an action by a mortgagee upon his security, the value of the subject-matter must depend on two considerations, the amount of the debt, and the value of the property which the mortgagee seeks to make available for the satisfaction of the debt. If the value of the mortgaged property exceeds the amount of the mortgage-debt, the value of the subject-matter in dispute must be the amount of the mortgage-debt, for the subject of the suit is not the property itself, but the right to make it available

for the satisfaction of the mortgage. But where the value of the property is less than the amount of the charge, the subject-matter is the right to make the property available so far as it will suffice, and, as it cannot suffice to satisfy more than a sum proportionate to its value, the value of the subject-matter of the suit must be determined by the value of the property. (*Krishnama v. Srinivasa*, I. L. R., IV Mad., 339; *Janki Dass v. Budri Nath*, I. L. R., II All., 698.) Of course, the last observation only applies where the proceedings are merely *in rem*. For other instances of the difficulties inseparable from the system of regulating jurisdiction by value, see *Mana Vikrama, Zamorin of Calicut v. Soorya Narayana Bhatta*, I. L. R., V Mad., 284; *Marakar v. Munhoralali*, I. L. R., VI Mad., 140; *Amanat Begam v. Bhajan Lal*, I. L. R., VIII All., 438.; *Rup Chand v. Balvunt*, I. L. R., XI Bom., 591.

LECTURE V.

Mortgage by conditional sale—Differences in form between conditional sale and English mortgages—Differences between mortgages by conditional sale and sales with clause for re-purchase—Question of intention—Covenant by the mortgagor upon which he might be sued by the mortgagee—True rule of construction—No personal liability of the mortgagor—Nature of the Dristi-bundhuk and Gahen Lahen—Rights of the mortgagee—Personal liability of mortgagor not to be presumed in the absence of express covenant—Construction of the Sudder Dewany Adalut—Implied warranty of title by mortgagor—Remedy for breach of warranty—Leading case on the point—Measure of damages in England—Remedy for defective title of mortgagor—Remedy when security is insufficient—Remedy of mortgagee when pledge is accidentally destroyed—Principle upon which damages should be assessed—Right of mortgagee to prevent waste when security is insufficient—Failure to pay by appointed time—Regulation XVII of 1806—Process of foreclosure in Bengal—Stipulated period—Shoroshee Bala Dabee's Case—Forfeiture for breach of any condition—Application to follow demand for payment—The mortgage must be foreclosed as a whole—Case of joint mortgagors—Court to which application must be made—Duty of court on receiving application—Meaning of "Legal representatives"—Notice—Purchaser of part of property and attachment creditor, both legal representatives—Notice to be served on whom—Case of intestacy—Case of more than one mortgagor—Who are not entitled to notice—Provisions of the Regulation mandatory and not merely directory—Distinction between mandatory and directory enactments—View of the Allahabad High Court—What the notice ought to contain—Proceedings under the Regulation merely ministerial—Regular suit—*Forbes v. Amerunessa*—Title of the mortgagee—Right to recover rents—Nature of the restrictions imposed by the Regulation—Denonath Gangooly's Case—Process of foreclosure elsewhere than in Bengal, moulded on the practice of the English Court of Chancery—Whether a mortgagee can pursue his remedies concurrently—Right of mortgagee to possession immediately on default, how far qualified in Bengal by Regulation XVII of 1806—Limitation—Act XIV of 1859—Cause of action what—Possession of the mortgagor when permissive—Mortgagee's cause of action before foreclosure—Rights of mortgagor transferred to third party—Trespasser holding adversely to both mortgagor and mortgagee—Acts IX of 1871 and XV of 1877.

**Mortgage
by condi-
tional sale.**

A mortgage by conditional sale is, as its name denotes, a conditional conveyance of land as a security for the repayment of a loan "with a stipulation that if the money borrowed be not paid, with or without interest, by a certain day, the sale shall become absolute." It resembles very closely in form an English mortgage, both of them belonging to that class of securities in which the property pledged is liable to pass from the debtor to the creditor on

default of payment. They are, therefore, generally treated as analogous. (*Khelut Chunder Ghose v. Tarachurn Koon-doo*, VI Suth. W. R., 269; *Shoroskeebala v. Nundolal*, XIII Suth. W. R., 364; V Ben. L. Rep., 389; *Manly v. Patterson*, I. L. R., VII Cal., 394; (a) *Shurnomoyee v. Srinath Das*, I. L. R., XII Cal., 614.) There is, however, one important distinction between the two. In an English mortgage, the mortgagor gives a covenant for the payment of the debt, and, even if no such covenant is given, a debt is created by implication. But, in a mortgage by conditional sale in this country, the mortgagor does not make himself personally liable for the payment of the mortgage-money (b). There is, again, some difference in the form of the instruments. In an English mortgage the ownership is wholly transferred to the creditor, liable, however, to be divested by the repayment of the loan on the appointed day. The English mortgagor says to his creditor, "I sell my property to you, but if I repay the debt by a certain day, the conveyance shall be void or (as is now generally the case) you shall re-convey the property to me." In the Indian mortgage, on the other hand, the creditor acquires only a qualified ownership, which, however, by the terms of the agreement ripens into absolute proprietorship immediately on the default of the mortgagor. In the English mortgage, therefore, the mortgagee, by the terms of the agreement, has the right to enter upon possession of the property mortgaged to him, immediately upon the execution of the deed; but the mortgagee under a conditional sale has, generally speaking, no such right. The possession of

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(a) In this case, the plaintiff prayed for foreclosure or sale, and, in the event of the proceeds being insufficient, for a personal decree against the defendant for the amount of the deficiency; but the Court refused to grant the latter part of the prayer, on the ground that the suit was in the nature of a foreclosure suit. I may mention that the mortgage-deed did not contain a covenant to pay, but this was apparently regarded as immaterial, as the mortgage was in the ordinary English form. It was contended by the mortgagor that as no proceedings had been taken under Regulation XVII of 1806, the mortgagee was not entitled to foreclose; but the Court, without expressing any opinion on the point, ordered a sale instead of a foreclosure, unless the money was paid within one year from the date of the original decree, by analogy to the provisions of Regulation XVII of 1806. There can be very little doubt, however, that if an English mortgagee wishes to foreclose a mortgage in the mufussal, he must take proceedings under the Regulation. (See the cases cited above.)

(b) A conditional sale in this country is analogous to an English mortgage by trustees under a power, where there is no *cestique trust* to enter into the usual covenants.

LECTURE V. the mortgagor is, therefore, generally protected in an English mortgage by a covenant for quiet enjoyment till default, a covenant which, as a rule, would be wholly superfluous in an Indian mortgage, for the simple reason that with us only a qualified ownership passes to the mortgagee, which before default does not carry with it the right to the possession of the property.

English mortgage.

A practice, however, obtains in this country, which also seems to have prevailed in England in former times, by which the debtor executes a deed purporting on the face of it to be an absolute conveyance, the creditor, on the other hand, engaging to re-convey the property to the debtor on repayment of the loan. In such cases the conditional sale differs but very little in form from an English mortgage. The practice, however, is open to very serious objection, and is gradually dying out.

Redeemable sale or mortgage.

In the case of *Rajah Heera Singh* (N.-W. P., Vol. VIII, p. 564), where there was an absolute sale together with an agreement by the purchaser to re-convey the property, if the purchase-money, together with interest, were paid by a certain day, it was contended that the transaction between the parties was not a mortgage, but only "a redeemable sale," and, therefore, not subject to the rules relating to mortgages. The Court, however, held that a redeemable sale was identical with a mortgage, and that the vendor in a redeemable sale had an equity of redemption which must be foreclosed in the same way as in the case of an ordinary mortgage. (See also *Arman Pandey v. Norrotun Kunwar*, III Macnaghten's Sel. Rep., 78. Cf. *Gholam Russool v. Fufjo*, IV and V Agra H. C. Rep., 129; *Imdad v. Mannu*, I. L. R., III All., 509.)

Difference between mortgage and redeemable sale.

There can be no doubt that the case was correctly decided; but the proposition about "redeemable sales" is stated in terms which are somewhat unnecessarily broad. It is true that the rights of the mortgagor may not be defeated under colour of a redeemable sale; but care must be taken to distinguish a mortgage from a *bond fide* sale with a clause for re-purchase. The two things resemble one another closely in form, but differ widely in their incidents. If there is a *bond fide* sale with a condition for re-purchase, the power must be exercised strictly in compliance with the terms of the condition, while in the case of a mortgage, a failure to fulfil the strict terms of the agreement is not immediately followed by a forfeiture of the property.

The reason for this distinction is, that in the case of a *bond fide* sale with an option to the vendor to re-purchase within a given time, there is no equity whatever to relieve against the sale, the rights of the purchaser being entitled to protection equally with those of the vendor; while in the case of a mortgage the transaction is regarded only as a security, and the mortgagee is sufficiently compensated by receiving interest in default of payment at the appointed time. The distinction is illustrated in several English cases, in which Courts of Equity, notwithstanding the jealousy with which such transactions are viewed, have refused to relieve the vendor from the consequences of his own default, and it has been acted upon by our own Courts in more than one reported case. (*Rajah Lakshmi Chelliah Garu v. Rajah Sri Krishna*, VII Mad. H. C. Rep., 6; *Venkappa Chetti v. Akku*, VII Mad. H. C. Rep., 219. Compare *William v. Owen*, 5 Myl and Cr., 303; *Ensworth v. Griffith*, 5 Bro. P. C., 184). *Verner v. Wenstanley*, 2 Sch. and Lef. 393; *Goodman v. Grierson*, 2 B. & B., 279.)

It is important to observe that the expression conditional sale is in itself somewhat misleading, although it is frequently used in Indian Courts to denote a mortgage by *kutkobala* or *bye-bil-wufa*. It is only a somewhat loose and inaccurate way of expressing the contract known by the term mortgage in the English law. (*Alu Prasad v. Sukhan*, I. L. R., III. All., 614.)

Mortgage
and condi-
tional sale.

The distinction between a mortgage and a conditional sale properly so called, is, however, sometimes very nice, and it is not always easy to determine the class to which a particular transaction belongs. The question is, was the transaction a *bond fide* sale with a contract for re-purchase, or was it a mortgage under the form of a sale? In this, as in every other case, the intention of the parties must be looked to, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence. (*Alderson v. White*, 2 DeG. and J., 97; see also *Nallana Gaundan v. Palani Gaundan*, II Mad. H. C. Rep., 422.) The real nature of the transaction must be carefully looked into; the mere form of the instrument not being conclusive, and a deed will not necessarily be regarded as creating a mortgage, although it may be described as such on the face of the document. Thus, where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous

Question of
intention
in all such
cases.

LECTURE mortgage by the grantor, and was, under the second deed, V. to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him, it was held that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale. (*Subhabhat Bin Bahanbhat v. Vasuderbhat Bin Subhabhat*, I. L. R., II Bom., 113.)

Covenant
to sue.

*Bapuji v.
Sena.*

The Court distinguished the case from *Howard v. Harris* (I. Vern, 190) on the ground that in the latter there was a covenant by the mortgagor upon which he might have been sued by the mortgagee. But there was no such absolute covenant in the case before the Court, as no debt whatever would have been due from the grantor until he adopted a son, and, the grantee, excepting in that event, would not have the usual remedies of a mortgagee. A similar construction was put on another deed in *Bapuji v. Sena Bharaji* (I. L. R., II. Bom., 231). It appears from the report that the grantor in that case executed to the grantee a document reciting a mortgage by the former to the latter of certain lands for Rs. 125, on which Rs. 200 were then due from the grantor to the grantee, and containing an agreement that the grantee should pay Rs. 75 to another creditor of the grantor, and purporting, in consideration of Rs. 275 so made up, absolutely to sell and convey the mortgaged lands to the grantee; and the grantee executed to the grantor a document of the same date, reciting the sale of the mortgaged lands by the grantor to the grantee for the consideration of Rs. 275, and covenanting that the grantee should re-convey to the grantor the lands (the subject of the grant), if the grantor should repay to the grantee the sum of Rs. 275 within a certain period, and providing that in case of default in such payment within such period, the covenant for re-conveyance should become null. It was held that the transaction was a sale, and not a mortgage, and that consequently the grantor had no right to redeem the lands after the expiration of the period so fixed for the payment of Rs. 275 by the grantor to the grantee, there being no evidence or allegation that, at the date of the execution of the two documents, Rs. 275 were an insufficient

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consideration for the sale of the lands, nor any stipulation that the grantee should account for the rents and profits received by him, or that the grantor should pay interest on the Rs. 275, nor anything to show that the grantor remained in possession after the execution of the two documents, or that subsequently to that time any advances were made by the grantee to the grantor on the security of the lands, nor anything in either document which pointed to a right on the part of the grantee to recover from the grantor the sum of Rs. 275 or any part of it before, at or after the period named for the repurchase. (*Bapuji Apaji v. Sena Bharaji Marvadi*, I. L. R., II Bom., 231.)

I must tell you that the test sometimes applied by English Judges, viz., the existence or absence of a power to recover the sum named as the price for the repurchase, cannot safely be applied in India, because, as you will presently see, there is, in general, no personal liability incurred by the mortgagor in a mortgage by conditional sale. There are, however, other circumstances which may furnish a key to the real character of the transaction. If, for instance, the conveyance is not followed by possession, or if there is a covenant for the payment of interest, the transaction will be regarded as a mortgage, while, if the purchaser is let into possession as owner with no power to recover interest upon the purchase-money paid by him, the instrument will probably be regarded as an absolute sale with an option to the vendor to re-purchase. It is, no doubt, possible to suggest a case in which the creditor might agree to take the rents and profits in lieu of interest, the real nature of the transaction being disguised under the appearance of a sale with a clause for repurchase; but even in such cases the adequacy or inadequacy of the sum mentioned in the instrument as the purchase-money would perhaps throw some light on the transaction. "The intention of the parties, as collected from the tenor of the deed, shows whether the *Bye-bil-wufa* be a sale with the reserve of an option of retractation within a limited time, or a mortgage for the security of money lent. A stipulation for a short period must be considered to mark that a sale was in the contemplation of the parties; a long term denotes a mortgage, or security for a loan, and such mortgages, in the form of conditional sales, are very common." (*Busunt Ali v. Ramkomar*, I Macnaghten's Sel. Rep., 77, note.

Personal
liability of
the mort-
gagor.

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Compare *Lakshmi Chelia v. Srikrishna*, VII Mad. H. C. Rep., 6, and *Venkata v. Akku*, VII Mad. H. C. Rep., 219, with *Nallana Ganadan v. Palani*, II Mad. H. C. Rep., 420; *Gurusamy v. Swamiudha*, II Mad. H. C. Rep., 450; *Ramsaran v. Amrita*, I. L. R., III All., 369, and *Chidambara v. Manikya*, I Mad. H. C. Rep., 63; see also *Sital Persaud v. Lachmi*, I. L. R., X Cal., 30; *Bhajan v. Mush-tak*, I. L. R., V All., 324; *Bhup Kuar v. Muhammadi*; I. L. R., VI All., 37. Compare *Badriprashad v. Dowlut*, I. L. R., III All., 706, where a document was construed as an agreement to sell and not a mortgage. See also *Juseem-uddeen v. Hurrosunderri*, XIX Suth. W. R., 274, where the document was construed as creating a redeemable lease.)

True rule
of con-
struction.

The true rule seems to be that wherever a transaction, in its inception, is intended as a security for money, whether this intention appears from the deed itself or from any other source, it is always considered as a mortgage, and therefore redeemable, although there may be an express agreement that it shall not be redeemable, or that, if redeemable at all, the right of redemption shall be confined to a particular time or to a particular description of persons. (*Goodman v. Grierson* 2. B. and B., 279.)

The criteria by which it may be determined whether a conveyance was intended as an absolute sale with a condition for repurchase, or, as a mere security, are thus formulated by Mr. Butler: "If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious." (Note No. 96, by Mr. Butler to his edition of Coke upon Littleton, 205 a., cited in *Bapuji Apaji v. Senabharaji Marvadi*, I. L. R., II Bom., 231.) The enumeration, however, I must warn you, is by no means exhaustive. I would only add that in doubtful cases the Court leans strongly to the construction most favourable to the person claiming the right to redeem. (*Longet v. Scawen*, 1 Ves. Sen., 402) (c).

(c) As to the distinction between mortgages and mere leases, see Lecture VII. There are also some cases which, so to speak, lie on the

The contract of mortgage by conditional sale is a form of security known under various names throughout the country. The *Dristibundhuk* of Madras is in its nature essentially the same with our own conditional sale, the debtor agreeing with his creditor to put him in possession, on default, of the property pledged to him, as absolute owner. The *Gahen Laken* of Bombay is also analogous to our conditional sale, and I propose to treat of these varieties of mortgages in the present lecture, as they all belong to that group of securities in which the ownership of the pledge is liable to be transferred from the debtor to his creditor.

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Dristibundhuk.

I intend, in the first place, to call your attention to the rights acquired by the mortgagee under a conditional sale, although the mutual rights and duties of mortgagor and mortgagee are necessarily so interwoven with one another that I cannot discuss the rights of the mortgagee without in some measure touching upon those of the mortgagor.

Rights of
the mort-
gagee.

Now, the first observation which I think it necessary to make is, that in a conditional sale in Bengal, and perhaps also in other parts of the country, the mortgagor does not ordinarily incur any personal liability. The creditor can only look to the land pledged to him for the satisfaction of his debt. If the debtor makes default, he may, it is true, foreclose the equity of redemption and become the absolute owner of the estate; but he cannot enforce payment from the debtor personally. If, therefore, the property is worth less than the amount due to him, he must suffer the loss, as a decree for foreclosure is the only remedy to which he is entitled. This was laid down in a very early "construction" by the Sudder Dewany Adalat of Calcutta, and the view of the law there taken, has not, so far as I am aware, been since questioned. The "construction" says: "If the mortgage be of the nature of a conditional sale and the money be not repaid,

No personal
liability
of the
mortgagor.

border-land between simple mortgages and mortgages by conditional sale; for an instance, see *Gookuldass v. Kriparam*, (XIII Ben. L. Rep., 205, P. C.,) where a covenant that if the mortgagor fails to pay, he shall cause settlement to be made with the mortgagee, was construed not as a mortgage by conditional sale, but as a simple mortgage. I may add that the Privy Council also held in this case that the rule that a *Bye-bil-wufa* does not become absolute upon breach of the condition as to payment without proceedings for foreclosure, obtains in the Central Provinces of India.

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V.

Personal
liability
not to be
presumed
without
express
covenant.

the lender, unless good and sufficient cause be shown, can only sue for possession of the property pledged, and has not the election of suing for the money or to be put in possession of the property as he may deem most advantageous to his own interest." (Construction, 898, 5th September 1834; see also VII Macnaghten's Sel. Rep., 92. As to the circumstances under which an action for debt may be brought, see *Khedoololl v. Rutton*, V Macnaghten's Sel. Rep., 10; *Bhugwan v. Govind*, I. L. R., IX Cal., 234.) (d).

The language of the 'construction' is not perhaps very precise, and it would seem that the proposition that the mortgagee must ordinarily look to the land is somewhat broadly laid down. The question, I presume, must depend

(d) In the last mentioned case the mortgagee was allowed to recover the costs of certain abortive foreclosure proceedings. (Cf. *Rasmoney v. Illahee*, S. D. A. 1854, p. 573.) It is important to observe that a mortgagee is entitled, according to the English law, not only to the costs incurred by him in perfecting his title or protecting it, but he may also recover any costs *bonâ fide* incurred by him for the purpose of realizing his security. Thus, if a sale by the mortgagee under his power becomes abortive otherwise than owing to the negligence or misconduct of the mortgagee, he will be entitled to add the costs of such sale to his security. (*Farrer v. Lacy Hartland and Co.*, 25. Ch. D., 636.) I may here mention that the peculiar nature of the law which is administered by the English Court of Chancery is well illustrated by the case of *ex-parte Fuings in re Sneyd* (25 Ch. D., 338), in which the Court held that an action of debt could not be maintained by the mortgagee against the mortgagor for costs and expenses properly incurred by the mortgagee in relation to the mortgaged property. "No doubt," observed Lord Justice Cotton, "if the debtor in his character of mortgagor, claimed to redeem the mortgage, the Court would not grant him that which originally was an indulgence—a departure from the strict tenor of his legal right—without imposing upon him the condition of paying the mortgagee not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in his position as such. But this is an entirely different thing from saying that an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said that the mortgagee's right in a redemption action, is founded on an implied contract by the mortgagor to pay these costs; but I am of opinion there is no such contract, but as a condition of redemption that a Court of Equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee." (25 Ch. D., 352.) It is however doubtful how far this distinction, which is based upon the peculiar nature of equitable jurisdiction in England, will be recognised by the Courts of this country. The mortgagor is not suffered to redeem except on payment of all costs incurred in protecting the estate, because he is liable as upon a quasi-contract to repay such moneys to the mortgagee; but in that case there is no reason why the mortgagee should not be allowed to maintain an action for such costs. You must, therefore, either refuse to allow such costs, whether the action is one for redemption or not, or you must allow the mortgagee the right to bring an action for them.

upon the particular language of the instrument, and all that can be affirmed as a proposition of law is, that personal liability shall not be presumed in the absence of an express covenant. Thus qualified, the proposition would not seem to be open to any reasonable objection. Possibly this is all that was meant to be laid down in the construction, although the language used might have been somewhat more precise. I have in my own experience found very distinct covenants for repayment in Bengali mortgages by conditional sale, and it would not, I conceive, be just to say to the mortgagees in such cases, "You must not sue upon the covenant, but must proceed to foreclose the equity of redemption."

I find that Mr. Justice Macpherson in his treatise on Mortgages defines a conditional sale as a mortgage; in which "the borrower, *not making himself personally liable for repayment of the loan*, covenants that, on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee." (Macpherson's Mortgage, p. 15.) This definition, or rather description, of a conditional sale, is apparently taken from the judgment of the Court in a very early case in the Sudder Dewany Adalat, and is, I should have thought but for the approval it has received both legislative and judicial, not altogether free from objection.

Construction of the
Sudder
Dewany
Adalat.

In making the foregoing observations, I must not be understood as expressing an opinion that the mortgagee will be permitted in this country to pursue all his remedies concurrently, or that he may not be put to his election. The case of *Mohanund Chatterjee v. Govind Nath Roy* (VII Macnaghten's Sel. Rep., 110) is a direct authority that a mortgagee having elected to foreclose will not be suffered to sue the mortgagor personally for the debt secured by the mortgagee.

The question, whether or not there is an implied warranty of title in a mortgage by conditional sale, is perhaps not wholly free from doubt. In the case of an out-and-out sale of immoveable property, there are conflicting dicta, if not decisions, and the same uncertainty extends to the case of a mortgage. The weight of authority however, so far as mortgages are concerned, seems to be in favour of the existence of an implied warranty. (*Dwarkan Dass v. Rutton Singh*, II Agra H. C. Rep., 119.) The question, however, is not of much practical importance, as there

Implied
warranty of
title by
mortgagor.

LECTURE V. are few mortgages in which some expressions may not be found sufficient to constitute an express warranty of title (e).

Remedy for
breach of
warranty.

The question next arises what is the remedy of the mortgagee if the title of the mortgagor turns out to be defective. This is pointed out by Mr. Justice Markby in delivering the judgment of the Court in *Syud Sayet Ali v. Syud Mohamed Jowad Ali* (VII Suth., W. R., 197.) In that case the title of the mortgagor having proved defective, the mortgagee brought a suit, in which, after stating the result of a certain action between the mortgagor and a third person, in which such third person was declared to be the owner of the property which had been mortgaged to the plaintiff, the plaintiff proceeded to state: "Hence, the right of Sayet Ali ceased to exist, and he held no longer any lien on the property sold. That, for this reason, your petitioner has become entitled to recover the consideration-money with interest accrued thereon."

*Sayet Ali v.
Mohamed.*

The plaintiff was filed on the 20th February 1864 before the time fixed for the repayment of the loan had expired. The defendant in his answer insisted that the suit was premature, as it was substantially a suit for the money which had been advanced, and which had not become due when the plaintiff was filed. Mr. Justice Markby, in overruling the objection, points out the real nature of the suit. The learned Judge observes: "With regard to the defence that the action is premature, because the time for repayment of the loan has not elapsed, we think that it is not well founded. The defendant has misunderstood the cause of action; it is not brought to enforce repayment of the loan, but it is an action for damages for breach of contract. A warranty of title amounts to a contract by the seller that, in consideration of the buyer purchasing the property and paying the consideration money, he (the seller) will make good to the buyer any loss which the buyer may incur by reason of the seller not having a good title to the property. This is an absolute contract from the moment it has been entered into, and the buyer can sue upon it at once, if he can show that the seller has not a good title in accordance with his undertaking, and that he has sustained loss in consequence." Further on, the learned Judge observes: "It is perhaps desirable to point out

(e) The matter has now been set at rest, but not completely, by the Transfer of Property Act.

that though, as above stated, the buyer may at once bring an action on a warranty of title, if he can show a breach of that warranty, it does not follow, as a matter of course, that he is entitled to recover back as damages the whole of the consideration money. Nor do we assent to an argument which has been put forward on the part of the plaintiff, and has received some countenance from the Principal Sudder Ameen, that, on its being ascertained that the seller had no title, the conditional sale was (to use the expression of the judgment below) *nullified* (f).

We thus find that the mortgagee has a right to bring an action for damages if the title of the mortgagor is found to be bad. The remedy of the mortgagee is not quite so clear when the pledge is destroyed by what is called an act of God, or suffers deterioration so as to become insufficient for the security of the creditor; although in one case where a mortgagee was deprived by diluvion of the possession of lands over which he held an usufructuary lease, before he had repaid himself the amount advanced by him, it was suggested that the mortgagee had a right, unless the terms of the lease were very special, to call upon the lessor to pay him the balance of the loan which remained unpaid. (*Sheo Golam Singh v. Roy Dinkar Dyal*, XXI Suth. W R., 226.) We have already seen that the Hindu law in such cases permitted the creditor either to demand another pledge or to sue the debtor immediately for the debt secured by the pledge. A similar right is given by the French Code Napoleon, and the principle may well be adopted by our own Courts as founded in justice and equity, and open to no reasonable objection (g).

Measure of
damages in
England.

While upon the subject, I may venture to suggest that a similar rule may, perhaps, be applied with advantage to cases in which the mortgagor's title is found to be defective. It is perfectly true that the creditor would be sufficiently protected by permitting him to sue for damages for the breach of the warranty, but I think there would be

Remedy for
defective
title of
mortgagor.

(f) Compare *Radha Churn v. Parbutty Churn* (XXV Suth. W. R., 51), where a prior mortgage had been suppressed; *Pitambur v. Ram Saran* (XXV Suth. W. R., 7), where the mortgagee was deprived by the wrongful acts of the mortgagor of a portion of the mortgaged land; and *Sawaba v. Abaji* (I. L. R., XI Bom., 475), where the mortgagee was evicted, and the security came to an end by the default of the mortgagor. See also Lecture VII.

(g) It has now been adopted by the Legislature,—see Sec. 68 of the Transfer of Property Act.

LECTURE V. very great difficulty in assessing the damages. As pointed out by the Court in *Sayet Ali v. Mohamed Jowad Ali* (VII Suth. W. R., 196), it does not follow that the mortgagee is entitled to recover as damages the whole of the "consideration money." For the purpose of this inquiry, I shall assume, as the Court apparently did in the case to which I have referred, that this would be one of those cases in which the mortgagor would be personally liable; for, otherwise, there can be no doubt that the mortgagee would be at least entitled to recover as damages the whole of the money lent by him. The question then arises what, assuming that the mortgagor is liable to be sued upon his covenant, is to be the measure of damages for the breach of the warranty. Now, the principle on which the damages ought to be assessed would seem to depend upon the difference to the creditor in the risk incurred by him under the altered circumstances; and this difference ought to be the measure of the damage suffered by the creditor. Now, the difference in the risk is, I apprehend, capable of a money-valuation in this way. What would be the rate of interest which the creditor would demand if the money were advanced on the personal security of the debtor? And the difference between this hypothetical rate and the rate at which the money was actually lent, would represent the loss to the creditor, not indeed with mathematical certainty, but with that substantial accuracy which alone is attainable in such cases. It is, however, evident that the principle cannot be worked out satisfactorily in practice. The Court can, at the best, only make a rough estimate of the loss sustained by the creditor. There can, therefore, be no serious objection to the extension to such cases of the rule that where by reason of an accident the mortgagee loses the benefit of the security, the mortgagor is bound either to repay the debt, or to give another pledge. The debtor surely cannot complain with reason of being obliged to repay, before the appointed time, money which would, in all probability, have been never lent to him but for his offer of a security which has turned out to be worthless; while the creditor would be only too glad to call in his money (*h*).

(*h*) It would seem that in England where a mortgage is made with covenant for title, the measure of damages in case of breach of the covenant is the original debt. (*Per Patteson, J.*, in 4 Q. B., 395. cited in *Mayne on Damages*, p. 197. See also Lecture VII.)

In the foregoing observations, I have confined myself to the rights acquired by the mortgagee immediately on the execution of the mortgage, and before any default has been committed by the mortgagor. In connection with this subject I may mention that, although the mortgagor is treated as the owner of the land before foreclosure, the mortgagee has the right, where the security is insufficient, to ask the Court to interfere to prevent waste by the mortgagor (*King v. Smith*, 2 Hare, 239). I have not, indeed, been able to find any Indian case directly bearing upon the point; but the rule is founded in good sense, and there can be no possible objection to its application in this country.

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Remedy
when
security is
insufficient.

I shall now proceed to discuss the rights of the mortgagee after default made by the mortgagor to repay the debt by the appointed time. If we were to look only to the terms of the contract between the debtor and his creditor, the ownership passes absolutely to the creditor immediately on default of payment; and this would seem to have been actually the case in this country before the legislature interfered and engrafted on, what I may call, the common law of India, the rule borrowed from the practice of the English Court of Chancery, by which the mortgagee is permitted to redeem within a reasonable time, after he has forfeited his right to do so by the strict terms of his agreement. The preamble of Regulation XVII of 1806, which was passed for the Presidency of Bengal, points out the necessity of "an equitable provision" for allowing a redemption within a reasonable and limited period, as the only means of guarding against improvident and injurious transfers of landed property by the forfeiture of mortgages accompanied with a conditional sale. In the other provinces, the legislature does not seem to have thought it necessary to interfere; but the same result has been accomplished by what is called, not perhaps very felicitously, judicial legislation.

Failure to
pay by
appointed
time.

Regulation
XVII of
1806.

I propose in the first place to call your attention to the provisions of the Bengal Regulation, by which the mortgagee was prevented for the first time from insisting upon a strict enforcement of the terms of his contract with the mortgagor. The mortgagee, in order that he may become the absolute owner of the property pledged to him, must proceed to foreclose the right of redemption, and the procedure which he has to adopt is pointed out by the eighth

Stipulated
period.

LECTURE V. section of the Regulation, which says: "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the *stipulated period*, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized *vakils* of the Court to the Judges of the *zillah* or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall at the same time notify to him by a *purwana* under his seal and official signature, that, if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

Leading cases on this point.

The preceding section declares the mortgagor entitled to redeem on payment of the principal sum with the interest due thereon. Now, the language of this section has given rise to a good deal of discussion; and I cannot do better than call your attention to some of the questions which have arisen upon it from time to time. In the case of *Shoroshee Bala Dabee v. Nund Lall Sein* (XIII Suth. W. R., 364; V Ben. L. Rep., 389) a somewhat nice question arose as to the meaning of the words "*stipulated period*" which occur in the eighth section of the Regulation. The facts in that case were shortly these: On the 4th of September 1863, Shoroshee Bala Dabee and her son Hemendro Nath Mookerjee executed a mortgage of certain landed property at Chittagong to one Gobind Chunder Sein. The deed was in the English form, and by it the property was conveyed to Gobind Chunder absolutely, subject to the proviso that in the event of the mortgagor's paying Gobind Chunder the principal sum of Rs. 54,437-10-4 on the 4th September 1868, and in the meantime paying interest on that sum at 10 per cent. per annum half-yearly, (*i. e.*, on the 4th March and 4th September), with annual rests in the case of default of such payment, then and in such case Gobind would re-convey.

The mortgagors failed to pay the whole of the interest which became due under the terms of the mortgage, and on the 4th December 1866, Gobind Chunder applied by written petition to the Judge of Chittagong, for a foreclosure of the mortgage pursuant to the provisions in that behalf of section 8 of Regulation XVII of 1806. Thereupon, the prescribed notification seems to have been made to the mortgagors by the Judge.

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Shoroshree
Bala
Dabee's
Case.

Upon the footing of this petition and notification, Nund Lall Sein, the son of Gobind Chunder, on the 15th April 1868 (his father having meanwhile died), instituted a suit for the establishment and confirmation of absolute purchase and to obtain possession of the mortgaged property accordingly.

It is obvious from this statement of the facts of the case that the application to foreclose, as well as the suit based upon it, were instituted before the period fixed for the repayment of the loan secured by the mortgage had elapsed. It was contended for the plaintiff that the suit was not premature, as according to the terms of the deed, the defendants had lost their right to ask for a reconveyance; and the Regulation was never intended to give a right to the mortgagor other than a right to redeem within a certain time, after he has lost all right to the property under the strict terms of the contract, and that the stipulated time within the meaning of the Regulation had, therefore, arrived as soon as there was a breach by the debtor. The contention, however, was overruled, and the Court in giving judgment observed: "If the Zillah Court was at liberty, and had the machinery to deal with this matter precisely upon the principles which govern the English Court of Chancery, the facts of the case are possibly such as would give the plaintiff a right of suit even before the expiration of the time agreed upon for repayment of the principal debt. For, whenever that has occurred by reason of which the mortgagor has lost his right under the deed to call for a reconveyance of the property, and he can only get back the mortgaged premises by virtue of the right of redemption which the Court of Equity still preserves to him, then also that Court allows the mortgagee to come in and insist that the mortgagor shall elect between the exercising of this right of redemption and being foreclosed. But we think that this mortgage-transaction, notwithstanding that it wears a completely English aspect, falls within

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the operation of Regulation XVII of 1806. It is in all respects parallel with the mortgage common in this country, which is effected by means of a bill of absolute sale, together with a contemporaneous *ekrar* for reconveyance; and mortgages of this sort have always been treated as being subject to the Regulation. The words 'conditional sale' as explained by the preamble, are broad enough to cover them, and there is no doubt that they are especially within the mischief against which the enactment was directed, This being so, the mortgagee can only obtain a foreclosure by following the procedure which is laid down by section 8 of the abovementioned Regulation. And although there is some ambiguity in the words of that section relative to the time when the mortgagee may first prefer his petition for foreclosure, this is cleared up by reference to the previous section. The last clause of the 7th section runs thus: "The whole of the provisions contained in section 2, Regulation I of 1798, and section 12, Regulation XXXIV of 1803, as applied therein to the *stipulated period* of redemption, are declared to be equally applicable to the *extended period* of one year granted for an equitable right of redemption by this Regulation."

"This makes it evident that the year of grace, commencing as it does with the notification which follows on the mortgagee's application for foreclosure, is intended by the Legislature to be additional to the period which is stipulated for redemption in the mortgage-contract; and, therefore, it follows that the application itself cannot be made before the expiration of that 'stipulated period.'

"Now the stipulated period of redemption, referred to by the Legislature in this Regulation, appears to us to be the whole period prescribed by the mortgage-contract for the performance of the conditions, upon the fulfilment of which the mortgagor is to be entitled to a reconveyance. We do not think that it in any case means less than this, or depends upon whether the mortgagor duly performs all those conditions or not. We see no reason for supposing that the Legislature by those words spoke, not of the period of redemption originally specified in the contract (as the words themselves certainly imply); but merely of the shorter period during which the mortgagor by performance of the conditions may have preserved his strict right to redeem under the contract.

"From the very object of the Regulation it is obvious

that the framers of it had expressly in view the case of a mortgagor who fails to perform the conditions necessary to give him the contract-right to redeem, and if they thought of the 'stipulated period' as a period terminating in the first default of the mortgagor, they would surely have used some apter expression than this to convey their meaning.

"According, then, to our view, in the case before us the 'stipulated period' did not expire until the 4th September 1868, and consequently both the presenting of the petition for foreclosure and the filing of this plaint occurred before the mortgagee had any right to take a single step towards foreclosing the mortgagor's equity of redemption. All the proceedings in this matter are, therefore, inoperative; the suit is without legal foundation and must be dismissed." (Compare *Imdad v. Munnu*, I. L. R., III All., 509, and *Buldeen v. Golab Koer*, Agra H. C. Rep. (F. B.) 102.

I shall presently ask you to contrast the case of Shorooshee Bala with another case in which also a question arose as to the meaning of the words "stipulated time." But before I do so, I wish just to make one observation. The Regulation seems to provide only for that class of mortgages in Bengal in which a forfeiture takes place by reason of the "money advanced not being repaid within a stated period," and although it is perfectly true that a forfeiture for breach of any other condition is equally within the mischief of the Act, the statute does not in terms embrace such cases.

Forfeiture
for breach
of any con-
dition.

According to the law as administered in the English Court of Chancery, and which is followed in those parts of the country in which Regulation XVII of 1806 is not in force, it seems that the mortgagee is entitled to sue at any time after default in payment of interest, where his right to do so is not qualified by a covenant not to call in the money during a certain period. (As to cases unaffected by the Regulations, see *Spences' Equity*, Vol. II, p. 675, and *Prosaddas Dutt v. Ramdhone Mullick*, I Ind. Jur., 1886, p. 255.)

As the law, however, stands at present in this Presidency, the mortgagee cannot call upon the mortgagor to elect between exercising his right of redemption and being foreclosed at any time before the period fixed for the repayment of the loan secured by the mortgage, whatever may be the nature of the covenants contained in the deed.

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V.*Oma-
churn v.
Behary
Lall.*

The case of *Omachurn Chowdhry v. Behary Lall Mookerjee* (XXI Suth. W. R., 274), however, shows that the object of the mortgagee may be indirectly accomplished by the fixing of an early date for the repayment of the money, followed by a covenant that the money shall not be called in for a certain term if the interest is paid regularly, and the other covenants in the deed are observed by the mortgagor. The distinction may seem to be somewhat refined, but it seems to be the only way in which the rights of the parties can be reconciled with the provisions of the Bengal Regulation.

In the case of *Omachurn Chowdhry v. Behary Lall Mookerjee*, the question arose upon a mortgage-deed in the English form by which the 3rd of January 1866 was fixed as the date for the repayment of the loan. This was, however, accompanied by a proviso that in the event of the debtor continuing to pay the interest on the principal sum regularly, the money should not be called in by the creditor before the 3rd of July 1871. The debtor having failed to pay the interest regularly, the mortgagee proceeded to foreclose under Regulation XVII of 1806 without waiting till the extended period mentioned in the proviso. It was contended for the mortgagor that the application was premature, as the 3rd of July 1871 was the "stipulated period" for the repayment of the loan within the meaning of the Regulation. The contention, however, was overruled, the Court observing that the last clause in the deed had not the effect of making the 3rd of July 1871 the stipulated period to which the Regulation would apply. Referring to the case of *Shoroshee Bala*, Chief Justice Couch, who gave the judgment of the Court, observed: "That is a different case from the present; and the decision rather supports the view which we take in this case, namely, that we are to look at the time which is stipulated for the payment of the principal sum, and that the intention of the parties is to be collected from the whole of the deed. To my mind, in all these cases, it is a question of intention,—what have the parties fixed upon as the time for payment?"

Question
one of in-
tention.

You will see that Sir Richard Couch says that the question is one of intention. This is no doubt perfectly true, and yet the language, if I may be permitted to say so, is somewhat misleading. In English mortgages a very early day is generally appointed for the repayment of

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the loan; but it is seldom "intended" that the principal is to be paid on the day named in the condition. Now, suppose the question arose under the Regulation, whether or not the day named in an English mortgage was that which the parties intended to be the stipulated time for repayment; I suppose the question would be answered in the affirmative, although in a certain sense it might be said that the parties knew very well that the repayment of the loan would not be insisted upon on the very day mentioned in the deed. The fact is, the words "intended" and "intention" are somewhat ambiguous, and, unless clearly explained, apt to be misleading, a reproach which they share with many other expressions familiarly used in the English law, and possessing the doubtful ~~quality~~ of being conveniently obscure.

To return to the provisions of section 8 of Regulation XVII of 1806. We find that the application must be preceded by a demand for payment. And if proceedings are taken without a previous demand, they will be wholly invalid. (*Beharilal v. Benilal*, I. L. R., III All., 408; *Karan v. Mohan*, I. L. R., V All., 9; *Ganes v. Sadanund*, I. L. R., XII Cal., 138.) It is, however, not necessary that the demand should be for the specific sum which may be ultimately ascertained to be due. (*Forbes v. Amerunissa*, X Moore. Ind. App., 340.)

Applica-
tion to fol-
low demand
for pay-
ment.

Again, the proceedings under the Regulation must be taken to foreclose the mortgage as a whole. In the case, for instance, of a mortgage in favour of two or more mortgagees, one of them cannot take proceedings to foreclose a portion of the mortgaged property for his share of the debt. (*Bishan Dial v. Manni Ram*, I. L. R., I All., 297 (i). But see *Indurjeet Koonwar v. Brij Bilas Lal*, III Suth. W. R., 130.)

The mort-
gage must
be fore-
closed as
a whole.

But there may be exceptional circumstances justifying a departure from the general rule that a mortgagor must not be harassed by a multiplicity of suits. Where the equity of redemption, for instance, in a part of the mortgaged premises becomes vested in the mortgagee, foreclosure proceedings may be taken in respect of the other portion for a proportionate part of the mortgage-

(i) The English law is very similar; see Fisher's Mortgage, p. 477. The mortgagee may, however, apply for foreclosure as trustee for himself as well as others, assignees for instance, beneficially interested in the mortgage-money (*Rajchunder v. Manorama*, XII Suth. W. R., 353).

LECTURE V. debt. (*Bisheshur Singh v. Laik Singh*, I. L. R., V All., 257; *Hunuman v. Kali*, Suth. W. R., 1864, p. 285.)

Case of joint mortgagors.

In cases governed by the Bengal Regulation, there are, however, difficulties in the way of such a proceeding, there being no machinery for ascertaining the several proportions in which the properties may be liable, the functions of the District Judge being, as we shall presently see, purely ministerial. Again, where there are several joint mortgagors, the mortgagee must proceed to foreclose all the mortgagors jointly, and it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on his own account in respect of his rateable share of the joint debt, and to release his share from further liability, and then to foreclose the other mortgagors for the balance of the mortgage debt. (*Chandika Singh v. Pakkar Singh*, I. L. R., II All., 906.) Without saying that there may not be cases of mortgages of separate shares in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, it may be safely affirmed that ordinarily proceedings must be taken to foreclose a mortgage as a whole. (*Norinder Narain Singh v. Dwarka Lal Munder*, I. L. R., III Cal., 397; *Chandika v. Pokkar*, I. L. R., II All., 906; *Bishendyal v. Munniran*, I. L. R., I All., 297; *Nilkant Banerji v. Suresh Chunder*, I. L. R., XII Cal., 414 P. C.; *Bhora v. Abila*, X Suth. W. R., 476; *Pursotam v. Chiangi*, I. L. R., IX All., 68. F. B.) (j).

Court to which application must be made.

To return to the Regulation: The section then points out the Court to which the application should be made, and the only point which it is necessary to notice on this part of the enactment is that where the properties are situated in two districts, the application may be made to either of the Judges within whose jurisdiction the property or a portion of it is situated. (*Rashmonee Debea v. Frankissen Dass*, IV Moore. Ind. App., 392; *Surjan v. Jagannath* I. L. R., II All., 313; *Prasanna v. Haran*, V Cal. L. Rep., 599.

Duty of Court on receiving application.

The Statute next defines the duty of the Judge on receiving the application, who is directed to cause the mortgagor or his legal representative to be furnished with a copy. Now the expression "legal representative" has given rise to a good deal of discussion. The earlier authorities were all reviewed in *Gunga Gobind Mondul v.*

(j) See further on the subject Lecture VI.

Banee Madhub Ghose (XI Suth W. R., 548; III Ben. L. Rep., 172), in which the question was whether the purchaser of a portion of the mortgaged property was entitled to notice. Mr. Justice Markby, in delivering the judgment of the Court, observed: "The question turns entirely on the construction to be given to the words 'legal representative' in Regulation XVII of 1806. In the first place, it is contended broadly that those words did not mean the legal representative of the mortgagor in respect of the particular property mortgaged, but *universal* legal representative, such as an heir; and there is, no doubt, some colour for this contention. These words are sometimes used in the latter sense, as for instance, in section 210 of the Code of Civil Procedure, and this is the idea which these words would at first sight rather suggest to my mind. But it appears to me to have been settled by long practice and authority that they were not used in this Regulation in this sense. The late Sudder Court held that the purchaser at a sale in execution of civil process is entitled to notice, and that doctrine has, I believe, ever since been acquiesced in. Now, this completely negatives the construction contended for. An auction-purchaser, as he is called, is not the universal legal representative of the mortgagor; he is only the assignee of a portion of his property.

LECTURE
VLegal
representative.

"It also appears to me to have been decided by a great preponderance of authority in this Court (although I admit that the decisions are not altogether reconcileable), that a purchaser out-and-out of the mortgagor's interest, whether by public or private sale, and whether he be in possession or not, must be served with notice, except where any alienation of the mortgagor's interest has been prohibited by contract between the mortgagor and mortgagee. It is not necessary to go through the cases which are all collected in Macpherson on Mortgages, 5th edition, page 179.

"Nor do I think that there is any ground for putting upon these decisions the restrictions which have been now contended for, namely, that they do not apply to cases where the whole of the property comprised in the mortgage has not been sold by the mortgagor, or to cases where the mortgagee has no notice of the subsequent sale, both which peculiarities are said to be found in the

LECTURE V. case now under consideration. I do not see that a purchaser out-and-out of a distinct and definite portion of the property is in a different position from a purchaser of the whole. And as to the question of consent, I see no ground whatever for introducing that consideration. If, as is now decided, the words 'legal representative' include an assignee of the mortgaged property, it appears to me that they must include *all such assignees*, and that to make a distinction between assignments to which the mortgagee has or has not consented, would be an unwarrantable addition to the provisions of the Legislature." (See *Kishen Bullubh Mahta v. Messrs. Belasoo Coomar*, III Suth. W. R., 230; *Brojonath Dass v. Nobakishen Mookherjee*, VI Suth. W. R., 230; *Dirgaj Singh v. Debi Singh*, I. L. R., I All., 499. Cf. *Rameswar Nath Singh v. Jugjeet Singh*, I. L. R., XI Cal., 341.)

Purchaser
of part of
property a
legal repre-
sentative.

We thus find that a purchaser of a part of the mortgaged property is a legal representative equally with an assignee of the whole of the property. In the case of *Mohun Lall Sukul v. Brojonath Kundu* (X Moore. Ind. App., 1), the words were construed in a still more extended sense. In that case the mortgagee, after an unsuccessful attempt to withdraw an attachment which had been taken out against the mortgaged property by a judgment-creditor of the mortgagor, applied to the District Judge for foreclosure under Regulation XVII of 1806. The notice of foreclosure was served only on the widow and heiress of the mortgagor, and not on the creditor by whom the property had been taken in execution. The property was subsequently sold under the attachment which had been unsuccessfully contested by the mortgagee, and the purchaser under the execution, as the assignee of the debtor's equity of redemption, brought a suit for possession against the mortgagee upon the ground that the mortgage-debt had been paid off from the rents and profits of the mortgaged property. The mortgagee in his defence relied upon the proceedings taken by him under the Regulation, and contended that the equity of redemption had been foreclosed. The Privy Council, however, were of opinion, that there was no valid foreclosure as no notice had been served upon the attaching creditor; Lord Justice Knight Bruce who delivered the judgment of their Lordships, observing that the mortgagee, when he filed his application for foreclosure,

not only had notice that the interest of the mortgagor had been taken in execution, but was actually disputing the right of the creditor to put up that interest to sale. Under such circumstances his Lordship thought that the notice ought to have been served on the decree-holder, adding: "It was quite clear upon the authorities that if the sale had taken place before the application for foreclosure, such application could not have been effectual unless the purchaser had been served with it." (But see *Soobhal Chunder Pal v. Nitai*, I. L. R., VI Cal., 663; *Radhey v. Bujah*, I. L. R., III All., 413.)

This reference to the peculiar circumstances of the case would seem at first sight to suggest that it was not decided solely with reference to the meaning of the words "legal representative" in the Regulation; but this decision must be read with another decision of their Lordships (*Pattabhiramier v. Vencatarow*, VII Ben. L. Rep., 136, P. C.), in which it was held that in the absence of any express legislative enactment, the interest of the mortgagee becomes absolute according to the terms of the contract by the mere failure of the mortgagor to redeem. We are therefore bound to suppose that in the earlier case of *Mohun Lall Sukul*, the Privy Council considered that the words "legal representative" were sufficiently wide to embrace an attaching creditor who, as we shall hereafter see, acquires a sort of statutory hypothecation by virtue of the attachment. It follows that a puisne mortgagee, whether by way of simple mortgage or conditional sale, is entitled to notice under the provisions of the Regulation. (*Nuddiar Chand Chuckerbutty v. Roop Doss Banerjee*, XXII Suth. W. R., 475.)

The Regulation is silent as to the person on whom the notice of foreclosure is to be served when the person entitled to redeem is an infant. When a guardian has been appointed by the Civil Court, or the estate has been taken charge of by the Court of Wards, there can be no difficulty whatever—service on the guardian being a perfectly good service. If, however, no guardian has been appointed, it would seem that service on the person who would have a preferable claim to the guardianship of the minor would be deemed a good service. (*Dabee Persaud v. Manu Khan*, II All. H. C. Rep., 444. See also *Rashmonee Debea v. Prankissen Doss*, IV Moore. Ind. App., 292; VII Suth. W. R., 66, P. C.) The safest course, however, for the mortgagee would be to apply to the District

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V.

Attaching
creditor a
legal
represent-
ative.

Notice to
be served
on whom.

LECTURE V. Court for the appointment of a guardian, who might be served with the notice of foreclosure.

Case of
intestacy.

In a case of intestacy the mortgagee must serve the heir-at-law of the mortgagor, and service upon the party in possession but without any valid title, would not, except, perhaps, under very peculiar circumstances, be deemed sufficient for the purpose of foreclosing the mortgage. (*Kalikumar v. Prankishori*, XXII Suth. W. R., 168.) A literal compliance with the directions of the law, however, is not always essential. Thus, where it appeared that, although the notice was addressed to the mortgagor who was dead at the time it reached the hands of his heirs, the service was held sufficient to entitle the mortgagee to foreclose the mortgage. It is important to observe that no fresh notice is required where the mortgagee allows an extension of time beyond the year of grace allowed by the Regulation, the action of the mortgagee not amounting either to a renewal of the mortgage or to the substitution of another mortgage for the original pledge. (*Brijo Mohun Sutputty v. Radha Mohun Dey*, XX Suth. W. R., 176. See also *Boijnath v. Maheswari*, I. L. R., XIV Cal., 451, and cases cited therein.)

Case of
more than
one mort-
gagor.

Where there are more mortgagors or legal representatives of such mortgagors than one, the notice ought to be served on each of them. A more difficult question arises when the mortgage is executed by one of several co-sharers, a practice not uncommon in this country; but under circumstances under which if the transaction had been an out-and-out sale, it would be binding upon all the co-parceners. Thus, for instance, suppose A, the managing member of a joint Hindu family, executes a mortgage of an estate belonging to the joint family, the other members assenting to the transaction, either according to the usual practice by subscribing their names as attesting witnesses, or otherwise ratifying the transaction. There is little doubt that in such cases, if the mortgagee is not aware of the rights of the other members, it would be sufficient if the notice is served on the person by whom the mortgage was executed. The difficulty arises only where the mortgagee is aware of the fact that the mortgagor is not the sole owner. It would seem, although the authorities are not very clear or consistent on the point, that even in such cases there may be a valid foreclosure on the foundation of a notice served only on the person who appears to be the

mortgagor on the face of the instrument by which the charge is created. *Ramgopal v. Rajkishore*, S. D. A., 1849, p. 36; *Bhowannychurn, v. Gooroopersaud*, S. D. A., 1856, p. 923. Cf. *Punchum v. Mungle*, III Agra H. C. Rep., 207, and cases cited therein.)

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I may mention that persons deriving title subsequently to the application of the mortgagee to foreclose are not entitled to any notice. If it were otherwise, proceedings in a foreclosure suit would be endless, as a fresh alienation might be made every day in the course of the proceedings. (*The Bishop of Winchester v. Paine*, 11 Vesey, 194; see also *Bhanumutty Chowdrain v. Prem Chand Neogee*, XV Ben. L. Rep., 28. But see *Sheogolam v Ramrup*, XXIII Suth. W. R., 25, where, however, the assignment took place before the notice was actually served, and the mortgagee was cognizant of such assignment.) The rule, however, as I have already explained, does not apply to a purchaser under an execution, whose purchase, although subsequent in date to the application for foreclosure, was made under an attachment executed before the application to foreclose by the mortgagee. (*Anundmoyee Dassea v. Dhunindro Chunder Mookerjee*, XVI Suth. W. R., P. C., 19; S. C., XIV Moore Ind. App., 111.) In such cases, however, it would seem that notice to the execution-creditor would be sufficient.

Who are
not entitled
to notice.

Then, as to the nature of the service, it must, where practicable, be personal, and substituted service will not be good except where the mortgagor is shown to be keeping out of the way. In the case of *Syud Esaf Ali Khan v. Mussamut Azumtoonessa* (Suth. W. R., 1864, p. 49), Mr. Justice Norman, in delivering the judgment of the Court, said: "We may observe that, by the section now under consideration, the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evinced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court, that the notice itself must have reached the hands, or come to the knowledge of, the mortgagor." (Compare *Norendro*

LECTURE V. *Narain Sing v. Dwarka Lal Munder*, I. L. R., III Cal., 397, P. C.)

Provision of the Regulation mandatory and not directory.

You will observe that the Regulation directs that a copy of the application should be furnished to the mortgagor or his legal representative. This provision is mandatory and not merely directory, and an omission in this respect will, it seems, vitiate the whole proceedings. In the case of *Santi Ram Jana v. Modoo Mytee* (XX Suth. W. R., 363), where the mortgagor had not been served with a copy of the application, the Court observed: "It is urged, first, that the notice contained all the information which would be contained in the written application; and, secondly, that it was not the fault of the mortgagee, but of the Court peon, that the mortgagor was not furnished with a copy of the written application. But these are not considerations upon which we are at liberty to enter. The law prescribes two conditions which are to be fulfilled before a mortgage can be foreclosed, and we cannot say that the mortgagee before us, who has only fulfilled one of them, is in a position to foreclose. (See also *Denonath Gangooly v. Nursing Pershad Dass*, XXII Suth. W. R., 90; *The Bank of Hindustan, &c. v. Shoroshibala Debi*, I. L. R., II Cal., 311; *Norendra Narain Sing v. Dwarka Lal Munder*, I. L. R., III Cal., 397; *Madhoprosad v. Gajudhur*, I. L. R., XI Cal., 111.) The benefit of these provisions, however, may be waived. (*Saligram v. Behari*, Suth. W. R., 1864, p. 36.) But the mere fact that the mortgagor has not insisted upon the insufficiency of the notification at the trial in the original Court cannot be regarded as a waiver of any objection which he may have to the notification. (*Madhuprosad v. Gajudhor*, I. L. R., XI Cal., 111.)

View of the Allahabad High Court.

The Allahabad High Court has carried the principle of a close adherence to the provisions of the Regulation somewhat further, holding that a notice of foreclosure bearing the seal of the Court issuing it, but signed only by the Munsirim, and not by the Judge, is not a sufficient compliance with the law, and cannot be the foundation of a decree for foreclosure. (*Seth Harlall v. Nanick Pall*, III All. H. C. Rep., 176. See also *Basdeo v. Matadin*, I. L. R., IV All., 276.) In saying that this is carrying the doctrine further than the Calcutta High Court has done, I do not mean to suggest that the decision is not perfectly good law, although it may possibly work hardship in particular

cases (*k*). At any rate it is better to adhere closely to the plain directions of a statute than to fritter it away by calling in the distinction between mandatory and directory enactments, a distinction which, unless carefully fenced in, would introduce the greatest uncertainty into the law (*l*).

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An examination of the general question to which the discussion has conducted us would be beyond the range of these lectures. Those of you who wish to know more on the subject may consult among others the following English cases: *Morgan v. Parry*, 17 C. B., 334; *Henderson v. The Royal British Bank*, 7 E. and B., 356. Compare *Bowman v. Blyth*, 7 E. and B., 26: and *Friend v. Dennett*, 4 C. B., N. S., 576.

I may here mention that the notification to the mortgagor ought to tell him distinctly that if he does not redeem the mortgage within one year, the mortgage will be finally foreclosed, and the conditional sale will become absolute. In one case, in which the notice, after stating that an application had been made for the purpose of foreclosing the mortgage, called upon the mortgagor to appear and state any objection which he might have to the proceeding, the Court held that there was no notification as directed by the law, and refused to make a decree for foreclosure. (*Bheekhun Khan v. Bheekhun Khan*, III All. H. C. Rep., 35.)

What the
notice
ought to
contain.

To return once more to the Regulation: we find that if everything is regularly done, the conditional sale becomes absolute unless the mortgagor takes the proper steps for the purpose of protecting his right of redemption within one year from the date of the "notification." I shall consider in the next lecture the steps which the mortgagor must take for that purpose. It is, however, necessary to state that these proceedings are not judicial proceedings, and any question between the parties may be raised in a regular suit. (*Forbes v. Amerunnessa*, X Moore Ind. App., 340.)

Proceed-
ings under
Regulation
merely
ministerial.

"It has been ruled by the Circular Order of the 22nd of July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVI of 1806,

Regular
suit.

(*k*) These cases have since been followed by the Calcutta High Court; see *Doma Sahu v. Nathan*, I. L. R., XIII Cal., 50.

(*l*) It is said by a learned writer, not perhaps with much exaggeration, that "where the mandate of a statute is called and regarded as directory, the legislative enactment is neither strictly nor liberally construed, but simply disregarded altogether." (Sedgwick on Statutes, p. 368.)

LECTURE
V.*Forbes v.
Ameerun-
nessa.*Title of the
mortgagee.

section 8, are purely ministerial, and that a mortgagee after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title, if he is in possession.

"In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege, and prove if he can, that nothing is due, or that the deposit, if any, which he has made, is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether any thing at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone." (*Per Lord Kingsdown, delivering the judgment of the Judicial Committee in Forbes v. Ameerunnessa.*)

Although in one sense it may, therefore, be said that the title of the mortgagee is not complete till he obtains a decree in a regular suit, it must not be understood that the decree creates any title in favour of the mortgagee. It only establishes, beyond all question, that as between the mortgagor and mortgagee, the ownership has passed absolutely from the former to the latter. The title of the mortgagee in reality dates from the end of the year within which the mortgagor is permitted to redeem, and it is for this reason that the mortgagee may maintain an action for mesne profits against the mortgagor for the period between the expiration of the year of grace and the actual recovery of the land. (*Jeora Khun Singh v. Hookum Singh*, V Agra H. C. Rep., 358. See also *Suroop Chunder Roy v. Mohender Chunder Roy*, XXII Suth. W. R., 539; *Lotjhussain v. Abdul*, VIII Suth. W. R., 476; *Khub Chand v. Liladhar*, Agra, H. C. Rep., 1868, p. 103; *Tawakkul v. Luchman*, I. L. R., VI All., 344.)

On the same principle it has been held that as the mortgagee becomes the owner of the property on the expiration of the year of grace, he is liable in an action for contribution in respect of a payment of revenue which falls due after the end of the year of grace, and the mere fact that no regular suit has been brought by the mortgagee is no defence to such an action. (*Gungagobind*

Mundul v. Ashootosh Dhur, XXI Suth. W. R., 255.) Similarly the mortgagee of a leasehold property becomes liable for rent to the landlord after foreclosure, at any rate where he takes possession (*Macnaghten v. Bhikaree*, II Cal. L. Rep., 323. Cf. *Kaleedas v. Butcher*, S. D. A. 1856, p. 1019; *Macnaghten v. Mewalall*, III Cal. L. Rep., 285, but the law laid down in the last case is doubtful.)

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It does not, however, follow that the mortgagee will be entitled to recover rents from the tenants of the mortgaged property in the absence of any notice to them. In *Raisuddin Chowdhry v. Khodu Nawaz Chowdhry* (XII Cal. L. Rep., 479), it was held that a mortgagee who has foreclosed his mortgage, is not entitled to rent from a tenant of the property from the expiration of the year of grace, but that he is entitled to rent only from the date on which he perfected his title by bringing a regular suit; and the tenant had notice of his having done so. The case perhaps was correctly decided; but there are certain observations in the judgments of the learned Judges, which betray some misapprehension of the rights of a mortgagee after foreclosure, an expression which, although not very correctly applicable to proceedings under Regulation XVII of 1806, I am obliged to use for the sake of shortness. In giving judgment, Mr. Justice Field said: "According to a long course of decisions in this Court, it is well settled that the title of a mortgagee is not completed upon the expiry of the year of grace allowed by the Regulation, but that it is necessary for him to bring a regular suit and obtain a decree in order to confirm his title;" and Chief Justice Garth observed: "It is clear that until he, that is, the mortgagee, had perfected his right to foreclosure by means of a suit, the mortgagor's interest was not at an end, and the mortgagee was not entitled to the rent. He would only be entitled to it from the time when he perfected his title,—from the time when the tenant had notice that he had done so." These observations are sufficiently answered by the judgment of the learned Judges of the Agra High Court in *Geora Khun Sing v. Kukoom Sing*, (V Agra H. C. Rep., 358), to which I have already referred.

Right to
recover
rents.

I have been at some pains to explain the real character of the proceedings under Regulation XVII of 1806, and the relation they bear to the regular suit which the Circular Order enjoins, because I find there is some misconception on the point, arising probably from the observation

LECTURE made by the Privy Council in the case of *Forbes v. Amerunnessa* (X Moore Ind. App., 340) that the "title of the mortgagee is not even then (when the mortgagee has failed to redeem within the year of grace) complete." The context shows that all that was meant by these words was that the title of the mortgagee,—the functions of the District Judge being merely ministerial,—might be impeached by the mortgagor in a regular suit, notwithstanding the regularity of the proceedings under the Regulation, in other words, that the mortgagee's title was not as secure as under a decree for foreclosure.

Nature of
the restric-
tions im-
posed by
the Regula-
tion.

Before quitting the subject I wish to call your attention to the precise nature of the restrictions imposed by the Bengal Regulation upon the strict rights given by the contract to the mortgagee. It has only extended the period of redemption to any time within one year from the date of the notification to the debtor that the creditor is desirous of enforcing the repayment of the debt, but any other covenants which may be contained in the deed are left wholly untouched. If, therefore, there is a covenant that the mortgagee shall enter upon possession on the default of the mortgagor, he will not be restrained from taking possession, although he should attempt to do so before foreclosing the debtor's equity of redemption. He can, however, only take the rents and profits as mortgagee, liable to account to the mortgagor. The question whether a mortgagee in this country has a right to bring ejectment immediately upon default, was discussed in the case of *Denonath Gangooly v. Nursing Pershad Dass* (XXII Suth. W. R., 90), which deserves very careful study. The question for the decision of the Court in that case was whether the mortgagee was entitled to possession on the default of the mortgagor without foreclosure, the right to such possession being expressly stipulated for, and their Lordships, in giving judgment, observed: "The law has provided that if the mortgagee take possession, he is accountable to the mortgagor for the profits which he has received. The law has also provided that if the mortgagor desire to redeem the property, he may do so within the period specified in the Statute of Limitation, unless the mortgagee shall in the meantime have taken proceedings for foreclosure; and the effect of those provisions is, no doubt, greatly to curtail the rights which the mortgagee has stipulated for. But one of the rights here expressly stipulated for is the right to possession, and

Denonath
Gangooly's
Case.

the law has nowhere provided that this right shall not be exercised by the mortgagee. There is indeed a case in which it appears to be laid down that the mortgagee under a conditional sale has no right of possession until foreclosure (Sudder Dewany Adawlut Reports 1857, page 1818), but I cannot reconcile that with the two decisions of the Privy Council to which I have referred. (*Anundmoyee v. Dharendro*, XIV Moore Ind. App., 101; *Brojonath v. Khelat*, XIV Moore Ind. App., 144). In both these cases the property was situated in the mofussil, and it would, I think, be impossible to hold that the mortgagee of property in the mofussil under a mortgage in the English form had a right to the possession, and a mortgagee by conditional sale had not. In both cases the mortgagee by conditional sale had contracted for the possession at a certain date, and therefore if he be debarred from his right to possession, it must be by reason of the Regulations. But the Privy Council has given a construction to the Regulations which is that they do not debar the mortgagee from taking possession if he has stipulated for it after default. But, on the contrary, on default the right of entry immediately accrues. It seems to me therefore that the first distinction relied on avails nothing, and that the plaintiff under this deed of conditional sale had the same right of entry after default as the mortgagees had in the two cases decided by the Privy Council.

I shall now ask you to compare the law of foreclosure in the Presidency of Bengal with that which obtains in other parts of India and which is based on the practice of the English Court of Chancery. The mortgagee wishing to foreclose brings a suit, praying that an account may be taken of the principal and interest due on the security, and that the defendant may be directed to pay the same by a day to be appointed by the Court, or be foreclosed his equity of redemption. An account is then taken, and a decree is made for payment within a certain time, generally six months, the mortgage being foreclosed in the event of default, when the mortgagee may obtain an absolute order for foreclosing. Sometimes a sale is directed instead of foreclosure, but the practice is not general (*m*). We have

LECTURE
V.
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Foreclosure
elsewhere
than in
Bengal.

(*m*) It is said that suits for foreclosure are rare in Madras, although the right of the mortgagee to foreclose was fully recognized in *Van-kata v. Tirumala* (II Mad. H. C. Rep., 289). See Shephard and Browns' Transfer of Property Act, p. 113.

LECTURE
V.
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Whether a mortgagee can pursue his remedies concurrently.

seen that English Courts of Equity have been armed by a recent statute with extensive powers of directing a sale instead of a foreclosure, and it is to be hoped that the Indian Courts will follow the same practice. (But, see Sec. 67 of the Transfer of Property Act.)

I may mention that a decree for foreclosure is not binding upon one not a party to the decree. It is therefore necessary that all persons entitled to redeem should be represented in the suit. In England it has been held that a partner who is entitled to pre-emption is a necessary party to a suit for foreclosure. (*Redmeyre v. Foster*, L. R., 2 Eq., 467). But I am not aware of any Indian case which has gone to this extent. The decree, however, is binding on those who are actually parties to it. (Fisher's Mortgage, 680. *Radhabai v. Shamrav*, I. L. R., VIII Bom., 168). The question whether a mortgagee is entitled to pursue all his remedies concurrently does not seem to have been directly raised in any case in this country. In England, where the mortgagee suspects his security to be deficient, the proper course for him would seem to be to proceed against the mortgagor on the collateral securities in the first instance, and then to apply for foreclosure for the deficiency. It is true that the mortgagee is at liberty to foreclose and then to proceed against the mortgagor on his collateral securities, but this has the effect of opening the decree of foreclosure, and is therefore attended with inconvenience. It is difficult to say how the Indian Courts will deal with such cases. It is necessary to observe that, even in England, in special cases the mortgagee may be restrained from exercising all his remedies at once. (*Barker v. Smart*, 3 Beav., 64; *Lockhart v. Hardy*, 9 Beav., 349), and if he deals with the mortgaged estate in such a manner that he cannot restore it on full payment, he will not be entitled to recover the mortgage money, as for instance, if he concurs with the purchaser of the equity of redemption in selling the estate and allows him to receive the purchase money. (*Palmer v. Hendrie*, 28 Beav., 341). In Bengal it would seem that the mortgagee, if he elects to foreclose, will not be suffered to proceed personally against the mortgagor, even when there is a covenant for the repayment of the debt. There is no provision in the Regulations for re-opening a decree of foreclosure, and this of itself would be a ground for putting the mortgagee to his election. The same difficulty, however, does not occur where

the mortgagee applies for foreclosure for the deficiency after having proceeded against the debtor personally. It is necessary to observe that a person having two mortgages cannot foreclose one of them and then sue upon the covenant in the other. A mortgagee cannot foreclose so as to vest the property absolutely in himself, without treating the whole of the debts secured on the property as satisfied; and the effect of bringing a second suit would be to re-open the foreclosure decree in the first action. (*Bapu v. Ramji*, I. L. R., XI Bom., 112; *Kali v. Kamini*, I. L. R., IV Calc., 475, reversed on appeal but on a different point) (n).

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As in Bengal, the mortgagee is entitled to enter upon possession on the default of the mortgagor, subject to his own right to foreclose and the right of the mortgagor to redeem. There being, however, no distinction between Courts of Equity and Courts of Common Law in this country, the law will not permit ejectment where the mortgagor would have a right to relief in equity. In the case of *Sitaram Dandekar v. Ganesh Gokhle* (VI Bom. H. C. Rep., 121), where the mortgage-deed contained a clause to the effect that the mortgagee should be entitled to possession on default by the mortgagor in payment of the interest on the principal money secured by the mortgage, the Court refused to make an absolute decree for ejectment, and directed the mortgagor to pay to the mortgagee the arrears of interest due to him within three months, or that in default the property should be delivered to the mortgagee to be held by him under the terms of the mortgage bond.

Right of
mortgagee
to possession
immediately on
default.

It is necessary to observe that a mortgagee is ordinarily entitled to his costs, but the rule is not inflexible. The Court may refuse them where he is guilty of gross misconduct, as by refusing a proper tender or by fraudulently denying the title of the mortgagor to redeem; but the mortgagee does not forfeit his right to costs by a *bonâ fide* claim to something which it afterwards turns out he is not strictly entitled to. (*Dhondo v. Balkrishna*, I. L. R., VIII Bom., 190). I will only add that in special cases, not only may the Court refuse the mortgagee his costs, but also fix him with the costs incurred by his improper conduct.

I will conclude by discussing the question of the time Limitation.

(n) It is necessary to notice that the mortgagor is not allowed to impeach a mortgage made by him, any more than the mortgagee can dispute the title of the mortgagor under whom he claims (*Fisher's Mortgage*, p. 682).

LECTURE V. within which the mortgagee is permitted to assert his rights under the statute of limitations. It is necessary that the student should have some knowledge of the previous state of the law on the subject—a knowledge which will not, I think, be wholly useless even to the practitioner. I shall, therefore, in the first place, discuss the question with reference to Act XIV of 1859, and then with reference to the Acts which have succeeded it in the statute book.

Act XXIV of 1859. Now the provision of Act XIV of 1859, applicable to mortgages generally, was that laid down in clause 12 of the first section of the Act, which said:—"To suits for the recovery of immoveable property, or of any interest in immoveable property, to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose."

Cause of action what.

The words "cause of action" were nowhere defined in the Act, but as pointed out by Mr. Justice Markby in *Denonath Gangooly v. Nursing Pershad Dass*, it is clear that two things are necessary to constitute a cause of action;—a right to possession, and an adverse withholding of that right. "If the plaintiff had not a right to immediate possession, or if having a right to possession, the defendants were holding with the plaintiff's permission, and acknowledging his right, no suit could be brought in the one case, because the right to possession had not accrued; and in the other, because it had not been disturbed or denied." (Per Markby, J., in delivering judgment in *Dinonath Gangooly v. Nursing Pershad Dass*, XXII Suth. W. R., 90.) Now we have already seen that a right of entry may, in some cases, accrue immediately to the mortgagee on the default of the mortgagor, but still no cause of action would arise if the mortgagor continued in occupation acknowledging the title of the mortgagee, and, as is not unfrequently the case, paying the interest on the principal sum to the mortgagee, who from various causes might be reluctant to assume possession of the pledge. In such a case as this, it could not be seriously contended, that by allowing the mortgagor to retain possession for a period of twelve years, the mortgagee lost his right to the security. "It would be confounding adverse occupations with those which have not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the demandant or others before him." (Per Lord

Kingsdown, VII Moore Ind. App., 353.) Similarly it was held that payment and acceptance of interest were evidence of the continuance of the relation created by the mortgage, and until the mortgagor advanced any rights adverse to the mortgagee his possession could only be regarded as permissive. (*Mankee v. Naunko*, XIV Ben. L. Rep., 314.)

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A difficulty, however, arose in those cases in which the mortgagor neither paid any interest nor did anything else to indicate that he acknowledged the right of the mortgagee. In such cases it used to be presumed, in the absence of any evidence to the contrary, that the possession of the mortgagor was only permissive, and could not, therefore, be urged as a bar to an action by the mortgagee. If, however, the mortgagor retained possession under such circumstances as would rebut the presumption of a permissive occupation, the mortgagee could not succeed. "A default may be made by the mortgagors, which may give the mortgagee a right to sue or to enter into possession (if he chooses to assert such right), but which may, notwithstanding, have no effect whatsoever in altering the nature of the mortgage title. So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, and advance no other title inconsistent with it, such possession must, *prima facie* at least, be treated as perfectly reconcileable with, and not adverse to, the title of the mortgagee and the continuation of the lien on the property pledged." (*Buldeen v. Golab Koonwar*, Agra Full Bench, 108.)

Possession
of the
mortgagor
when
permissive.

It was thought at one time that no cause of action could accrue to the mortgagee before foreclosure, and as there was no limit as to the time within which an application for foreclosure might be made under the Regulation, the curious result followed that a mortgagee might, if he chose to do so, enforce his security at any distance of time, and no safe title could possibly be acquired against a mortgagee in this country. The doctrine rested on the supposition, which I have shown to be erroneous, that no right of entry could accrue to the mortgagee till foreclosure. But if the deed was altogether silent as to the right to possession, or as sometimes happens, expressly said that possession should be taken only after foreclosure, the period would run only from the expiration of the year of grace. (See *Modun Mohun Chowdhry v. Ashad Alli Beporee*, I. L. R., X Calc., 68, and the cases there cited.)

Mort-
gagee's
cause of
action be-
fore fore-
closure.

I shall next consider the case in which the rights of the

LECTURE V. **Rights of mortgagor transferred to third party.** mortgagor had been transferred to a third person. Now, if such third person purchased with notice of the mortgage, the same presumption would be made as to the character of his possession as if the mortgagor himself had been in occupation. But if the purchase was made without any such notice, there could be no pretence for treating the possession of the purchaser as permissive, or as that of a person holding in privity of the mortgagor. In the case of *Anund Moye Dassee v. Dhunindro Chunder Mookerjee* (XIV Moore Ind. App., 111), the Privy Council observed:—"Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity of the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. The possession which the purchaser supposed he acquired was a possession as owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute owner." But this rule was not held applicable in a case in which there was no apparent change of ownership, and the mortgagor continued in ostensible possession, notwithstanding the sale of his rights. (*Manly v. Patterson*, I. L. R., VII Calc., 394).

Trespasser holding adversely to both mortgagor and mortgagee.

I have not considered the case of a trespasser holding adversely both to the mortgagor and mortgagee. If the trespasser entered into possession after default, there could be no difficulty whatever, as that would be a much stronger case than that of a purchaser without notice of the mortgage. A more difficult question arose, and the difficulty has not since been removed, when the occupation commenced before default, and the mortgagor took no steps for the purpose of vindicating his rights. There does not seem to be any method in this country by which the mortgagee may interrupt the prescription, and it would seem to be a hardship upon him to hold that the time would begin to run before he could bring any action to enforce his rights. The authorities are not very clear on the point. In a case reported in the *Weekly Reporter* for 1864, Mr. Justice Jackson observed:—"The question to be decided is, when did plaintiff's cause of action arise? They have alleged

that the date of expiry of their year of grace is the date from which the cause of action should be calculated. This may be the rule in those cases where the mortgagor remains in peaceable and undisturbed possession of the estate mortgaged. But the rule no longer stands good when the mortgagor is dispossessed, and his title disputed, and another person obtains possession of the estate. The possession of this new holder becomes a possession adverse to both the plaintiff's mortgagor and to the plaintiff, the mortgagee. If the mortgagee submits to this possession for more than twelve years, he loses his right to contest the title of the new holder. His cause of action against the new holder arose on the date on which the latter obtained such adverse possession of the mortgaged estate. Circumstances may occur which will defer the mortgagee's cause of action. If the mortgagor, for instance, contests the title of the new holder, and a litigation ensues between them, the mortgagee is not bound to take action upon his mortgage until that litigation is decided. But if the mortgagor's title is rejected, and his possession is disturbed by an adverse one, the mortgagee's cause of action against the new holder commences from the date on which the latter obtains possession on his title adverse to the mortgagor, which has been confirmed by the Courts. This is the law on the subject which has been laid down in the Privy Council." (*Ramecoomar v. Prosunno*, Suth. W. R., 1864, p. 375; Cf. *Vittobha v. Gangaram*, XII Bom. H. C. Rep., 180; *Anu v. Rama*, I. L. R., II Mad., 226.)

We have seen how the mortgagee may protect himself in those systems of law in which he is allowed to bring an action with the object of interrupting the prescription, but such a proceeding is wholly unknown in this country.

I may mention that section 6 of Act XIV of 1859 contained a special enactment with regard to suits on mortgages in Courts established by Royal Charter. "In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immovable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt."

It might perhaps be plausibly argued upon the language of this section, that in cases to which it did not apply, the mortgagee's right of action would not be kept alive by the

Section 6 of
Act XIV of
1859.

LECTURE V. payment of any portion of the principal money or interest. This, however, does not necessarily follow. The object of the Legislature was probably only to put mortgages in the English form, when sued upon in the Supreme Court, on the same footing as English mortgages. If this be a correct view, it would seem that, under Act XIV of 1859, English mortgages were placed in a less favourable position as regarded limitation than Mofussil mortgages, for, in the latter case, as we have already seen, the cause of action did not necessarily arise with the last payment of any portion of the principal or interest.

Act IX of
1871.

Act XIV of 1859 was replaced by Act IX of 1871, which contained a distinct provision for suits for possession of immoveable property by mortgagees. The period allowed under the new law was the same as that under the old statute, but it ran not from the accrual of the cause of action, but from the time when the mortgagee first became entitled to possession. It was thought at one time that the old doctrine of adverse and permissive occupation had been abolished by the new Act, and that the mortgagee must sue within twelve years of the date fixed for the repayment of the loan. In the case of *Lall Mohun Gungopadhyaya v. Prosuno Chunder Banerjee* (XXIV Suth. W. R., 433) the Court observed:—"The question raised in the earlier cases as to the accruing of the cause of action does not arise here, the legislature having in Article 135, Act IX of 1871, substituted for that occurrence a specific time, viz., the time when the mortgagee was first entitled to possession. This was confessedly the 29th Cheyt 1260."

In this view of the case, the nature of the defendant's possession, whether adverse or permissive, is immaterial. The mortgagee having his time expressly limited by the Act was bound to guard himself, and if he did not do so, and allowed the time to pass, he loses his remedy.

Brahmo-
moye Das-
si's case.

But a somewhat different view has been taken in subsequent cases. In *Ghinaram v. Ram* (I. L. R., VI Calc., 566, note) where the mortgage contained an express clause of entry on default of payment, the Court held that as the suit was brought within twelve years from the date on which the foreclosure proceedings became absolute, the plaintiff was not barred under Article 145 of Act IX of 1871, as the plaintiff was suing not as mortgagee but as owner, the Court observing that the fact of the mortgagee's taking foreclosure proceedings changed

his interest as mortgagee to that of absolute owner, and this judgment was followed in the case of *Brahmomoeye Dassi v. Dinnobundhoo Ghose* (I. L. R., VI Calc., 564). It appears that in both the above cases proceedings were taken by the mortgagee within twelve years from the date of default, and it was not therefore necessary for the Court to consider the question whether Article 135 had the effect of obliging the mortgagee to take proceedings within a particular period to foreclose his mortgage. It would, however, seem that the provisions of the Limitation Act are not applicable to foreclosure proceedings taken under Regulation XVII of 1806, such proceedings not being suits within the meaning of the statute of Limitations and there being no special provision in the Act regarding such proceedings, Article 179 being applicable only to applications *ejusdem generis* with those mentioned in the Act. It is, perhaps, doubtful whether the distinction upon which the Court proceeded in the above cases was present to the mind of the Legislature. However that may be, it would seem to be supported by the judgment of the Court of Appeal in *Pugh v. Heath*, (7 App. 235). (See also *Wrixon v. Vize*, 3 D. & W., 117; *Harlock v. Ashberry* (19 Ch. D., 539. Cf. *Purmanond v. Jamabai*, I. L. R., X Bom., 49; *Shurnomoyee v. Srinath Das*, I. L. R., XII Calc., 614).

In *Muddun Mohan v. Ashad* (I. L. R., X Calc., 68,) it was pointed out that where there is no express stipulation for possession on default, the mortgagee would be entitled to a right of action only after foreclosure, and a distinction was made between mortgages containing an express stipulation for possession and those in which there is no such covenant, but it is doubtful how far this distinction rests upon sound principle. A somewhat difficult question arose under Act IX of 1871 in cases unaffected by the Bengal Regulation where the English procedure was followed. The Articles which dealt with mortgages were 132, 135 and 149, the last Article relating to mortgages put in suit in Courts established by Royal Charters. A suit for foreclosure, it was said, could not correctly be described as a suit for possession by a mortgagee, although no doubt it may lead to possession; while to describe it as a suit for money charged upon land would also not be a very accurate description. The introduction again of Article 147 in the present Act would lead to the inference that

LECTURE V. suits for foreclosure had not been provided for in the earlier Acts, but these difficulties were got over in the same way in which they were met in England where it was held, although not without some conflict of opinion, that a suit for foreclosure fairly came as well under section 40 of Stat. 3 and 4, William IV, Ch. 27 corresponding to Article 132 as under section 24 of the same Act, which corresponded to Articles 135 and 149 of Act IX of 1871. (See *Dearman v. Wyche*, 9 Sim., 570; *Duvigier v. Lee*, 2 Hare, 326; *Wrixon v. Vize*, 5 Ir. Eq., R. 173; *Ganpat v. Adarji*, I. L. R., III Bom., 312.)

Act XV of 1877. These difficulties have been removed to a certain extent by the new Act, but other difficulties are likely to arise in dealing with suits by mortgagees after foreclosure under Regulation XVII of 1806. Article 147 of the present Act would seem to point to cases in which the English procedure is followed, and probably in Bengal a suit by the mortgagee after foreclosure for possession would be regarded as coming either under Art. 144 or Art. 135. (*Sharnomoye v. Srinath Das*, I. L. R., XII Calc., 614.) (o) Article 146 is

(o) The present as well as the past state of the law is thus summarised by Pigot, J., in *Shurnomoyee v. Srinath Das* (I. L. R., XII Calc., 614; cf. 619-620): 'From these decisions (*Khelat Chunder v. Tarachurn*, VI Suth. W. R., 270; S. C. on appeal XIV Moore. Ind. App. 150; *Dinonath v. Nursing Prosad*, XIV Ben. L. Rep., 87; *Mankee Koer v. Munnoo*, XIV Ben. L. Rep., 315) it would appear that under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be shown (or might properly be inferred), that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

In Act IX of 1871, Art. 135, it was declared that a suit instituted by a mortgagee for possession of immoveable property mortgaged must be brought within twelve years from the time when the mortgagee was first entitled to possession. And in the case of *Lal Mohun Gangopadhya v. Prosunno Chunder Banerjee*, (XXIV Suth. W. R., 315), it was decided that whether the possession of the mortgagor was permissive or adverse was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default, lost his remedy.

This seems to have been the received opinion with one exception, namely, the exception referred to in *Ghonaram Dobei, v. Ram Monorath Ram Dobei* (VII C. L. R., 580.) and in *Burmamoyee Dasi v. Denobundhoo Ghose* (I. L. R., VI Calc., 564; VII C. L. R., 583,) in which it was held that if the mortgagee could complete the foreclosure proceedings in a District Court within twelve years from the date of default, he then became absolute owner of the property, and the foreclosure proceedings gave him a new period of limitation.

A distinction between the decision in this case and the other cases already referred has been pointed out in *Modun Mohun Chowdry v. Ashad Ali Bepari* (I. L. R., X Calc., 68; XIII C. L. R., 53).

After the repeal of Act IX of 1871, the present law, Act XV of 1877, was enacted. In it a new clause is inserted, namely, clause 147, by

the correlative of Article 135, the one applying to Courts established by Royal Charters and the other to Courts not established by such charters. Notwithstanding, however, the improvements in the present Act, the omission in the third column of Article 146 has not been supplied. It contains a defective statement, but there can be very little doubt that it would apply to cases in which neither principal nor interest has been paid, the period of limitation in such case running from the date of default. An alteration has also been made by the present Act in Article 135 of Act IX of 1871 intended to meet those cases in which the parties agree to go on upon the footing of the mortgage after the mortgage term has expired. There is another slight alteration. The receipt by a mortgagee in possession of the produce of the land is, under section 20, to be deemed a payment for the purpose of that section, but it is somewhat doubtful whether this provision is qualified by the proviso contained in the section. Under Act IX of 1871 it was held that where the mortgagor continued in possession under a distinct agreement as tenant, the rent paid by him could not be regarded as a payment to save limitation. (*Ummer v. Abdul*, I. L. R., II Mad., 165). The Act has also supplied another omission. An acknowledgment by one of several mortgagees does not affect the others. The difficulties which

which a suit by a mortgagee for foreclosure or sale can be brought within sixty years from the time when the money secured by the mortgage becomes due. But as we have already said, no suit for foreclosure could ever be brought in the mofussil. This was prohibited by the nature of the agreement, and by the terms to which we shall refer later on of Regulation XVII of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation XVII of 1806 it was a condition precedent to his becoming an absolute owner, that foreclosure proceedings should be taken in the District Judge's Office.

When this has been done, a mortgagee having become absolute owner by virtue of the contract sues, not for foreclosure but for possession as owner of the property. It appears, therefore, impossible to hold that cl. 147 of the Limitation Act would apply to any mortgage by conditional sale executed between Hindus, and in respect of properties situated in the mofussil. If that be so, the law of limitation for a conditional sale would be that given in cl. 135, corresponding to cl. 132 of Act IX of 1871, namely, twelve years from the time when the mortgagor's right to possession determined on the date of default, namely, February 1866, and the suit for possession would be barred on the 17th February 1878. Does it make any difference, under Act IX of 1871, what the possession was? The suit is barred against the mortgagor himself or any body else. See *Lal Mohun Gangopadhyaya v. Prosnno Chunder Banerjee* (XXIV Suth. W. R., 433) and *Modun Mohun Chondry v. Ashad Ali Bepari* (I. L. R., X Calc., 68; XIII C. L. R., 53.)"

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have been felt in England in respect of arrears of interest and the distinction between a suit for redemption and a suit for foreclosure or an action on the covenant are not likely to arise in India. There is no provision in the Limitation Act corresponding to section 42 of Stat. 3 and 4, William IV, Ch. 27, and, as we have already seen, notwithstanding Article 63 of the Limitation Act, if the interest is a charge upon land, the same period of limitation is applicable to the recovery of the interest as to the recovery of the principal. (*Baldeo v. Gokal*, I. L. R., I All., 603; *Ganpat v. Adarji*, I. L. R., III Bom., 312; *Davani v. Ratna*, I. L. R., VI Mad., 417. For the previous state of the law, see *Vithal v. Daud*, VI Bom. H. C. Rep., 90, A. C. J.) (p.)

(p) See further on the subject of limitation, Appendix 2, tit. Statutes.

LECTURE VI.

Equity of redemption—Origin of expression—Position of mortgagor before foreclosure—Right to redeem—Bengal Regulation XVII of 1806—Recognized by Courts of Justices in other Provinces—Opinion of the Privy Council—*Puttavaram v. Vencatta Row Naiker*—"Once a mortgage always a mortgage"—Meaning of maxim—Persons entitled to redeem—Regulation XVII of 1806—Practice of English Courts of Chancery—Mortgage security indivisible—Effect of mortgagee's purchasing portion of mortgaged property—Contribution—Redemption under Bengal Regulations—Deposit or tender—What is a good deposit—*Rukea Begum v. Prannath Roy Chowdry*—Time within which deposit must be made—Practice in Bombay and Madras—Limitation—Acknowledgment—Effect of acknowledgment by one of several mortgagees—Difference between English Statute and Indian Act.

I NOW propose to call your attention to the position of the mortgagor before the mortgage is finally foreclosed, and the ownership of the pledge transferred from the debtor to the creditor. I have already pointed out that the mutual rights and obligations of the parties to a mortgage transaction are so closely interwoven with one another, that it is difficult to discuss the rights of the one apart from those of the other. There are, however, some points which will be more conveniently dealt with in the present lecture, and it is to these points that I wish to confine myself.

The interest which resides in the mortgagor before foreclosure is known in this country by an expression borrowed from the English law—an expression which is open, perhaps, to more serious objection than many others which we have borrowed from the same source. The interest of the mortgagor is known as the equity of redemption, or, as it is sometimes called, the right of redemption. Now even the expression "right of redemption" is not wholly unexceptionable. It suggests the idea, in common with the kindred expression "equity of redemption," that the interest of the mortgagor is a bare right: something essentially different from what we call ownership, which is supposed to be vested in some other person who, in this case, must necessarily be the mortgagee. It would, however, be more correct to say, that the ownership resides in the mortgagor notwithstanding the mortgage, the mortgagee

LECTURE VI. acquiring by the contract only the right to foreclose. If we, however, examine the history of the English law of mortgage, we shall find that the expression "equity of redemption" first made its appearance at a time when the mortgagor was supposed to have parted with the estate, retaining only the right of redemption or repurchase—a right, which being under the peculiar protection of equity, came to be known as the equity of redemption. The expression originally served to distinguish the interest of the mortgagor from the "estate" which was supposed to pass to the mortgagee. In time, however, this right came to be regarded as an estate by the Courts of Chancery possessing all the incidents of an equitable estate in land. The original expression, however, was retained to denote the interest which remained in the mortgagor, although the nature of that interest had been greatly modified by the action of the English Courts of Equity. The expression "equity of redemption" is, therefore, an expression peculiar to the English law, and although its introduction into India may be regretted, it would be idle to protest against it at this time of day. I do not wish to be hypercritical, and I have been induced to make the foregoing observations, simply because I know of instances in which the whole discussion has been materially coloured by notions, which would scarcely have suggested themselves to any body if the argument had not been conducted in the technical language of the English law (*a.*)

(*a*) The observations of Lord Blackburn, in *Jennings v. Jordan*, on the doctrine of consolidation of securities, deserve very careful attention. "Some of the rules acted on in the Courts of Equity, in the kindred subject of taking securities on the same property, says the learned Judge, are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law, and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now after for a very long time equitable estates have been treated and dealt with as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that *Cessante ratione cessare debet et lex*; but some rules apparently founded on this antiquated law have been so uniformly and long acted upon, that they must be treated as still binding." In the same case Lord Watson said:—"The principles of equity as settled in the law of England are generally such as commend themselves at once, even to minds unfamiliar with that law; but I must confess that in the present case I have been unable to apprehend or appreciate the equitable considerations upon which the doctrine of consolidation of mortgages, as now established, must be supposed to rest. The doctrine appears to me to have its root in equity. If A has separately mortgaged two estates

The position of the mortgagor in possession has given rise in England to a good deal of, not altogether profitable, discussion, which, however, cannot find any place in our law. The mortgagor does not part with the ownership of the property by pledging it to his creditor by way of conditional sale, and his position before foreclosure does not differ in any material feature from that of the mortgagor in a simple mortgage. It has been sometimes said that the position of the mortgagor in possession is that of a trustee. He is not the absolute owner of the land, but holds it subject to the rights of the mortgagee. This proposition, however, must be received with considerable reserve. It is true that the indefinite power of dealing with a property which we call ownership is in some respects controlled by a mortgage, but it is certainly not an accurate use of language to say that the mortgagor becomes a trustee for the mortgagee.

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Position of mortgagor before foreclosure.

From what I have already said, it must be clear to you that, as in the case of a simple mortgage, the mortgagor is competent to alienate the property notwithstanding the mortgage, although he cannot, for obvious reasons, pass any greater interest than he himself possesses. The assignee must take subject to the rights of the mortgagee, who, in the event of a foreclosure, acquires the property free of all subsequent incumbrances. The mortgagor may either transfer the property absolutely, or create a second mortgage, subject, however, to the same limitation. It is hardly necessary to add that the interest of the mortgagor may be taken in execution, although any sale by the creditor must necessarily be subject to the charge created in favor of the mortgagee. In short, the mortgagor is competent to deal with the property in any way he likes, so that the rights of the mortgagee are not defeated or impaired. I may add that the mortgagor in possession is never liable to account for the rents and profits received by him. This is the law in England, and it also seems to be the law in this country. (*The Malabar Company v. Dayaram*, Bom. P. J., 1875, 191). The mortgagor, however, while in possession, must not do

Right of alienation of mortgagor.

to B, it seems to be just and reasonable that a Court of Equity should decline to aid A in redeeming one of these estates, except upon condition of his paying to B the other mortgage debt, which might be insufficiently secured. But the equitable character of the considerations which have led to the growth and the development of the doctrine, as against purchasers of the mortgagor's equity of redemption, is by no means so apparent." (*Jennings v. Jordan*, 6 App. Cas. 698, cf. p. 720-721.)

LECTURE VI. anything to impair the security of the mortgagee, and, as I have already said, there can be very little doubt that he will be restrained from committing wilful waste, if the security is insufficient, or likely to be so rendered by such acts. (See s. 66 of the Transfer of Property Act). The mortgagor may, again, be liable in damages, for the breach, for instance, of a covenant to repair the mortgaged premises contained in the mortgage deed for the protection of the mortgagee's security. (*Sha Shivalal v. Sha Ramdas*, Bom. P. J., 1880, 246).

Regulation
XVII of
1806.

Opinion of
the Privy
Council.

We have already seen that, notwithstanding the mutual agreement of the parties, the ownership does not pass from the mortgagor to the mortgagee immediately on default of payment. The mortgagor, notwithstanding the default, continues to be the owner, or, to use the language of the English law, retains an equity of redemption which may be successfully asserted against the mortgagee. I told you in the last Lecture that this right was created for the first time in Bengal by Regulation XVII of 1806. No such provision was to be found in the statute law relating to the other Presidencies, but the doctrine of the English Court of Chancery, that the time stipulated in a mortgage is not of the essence of the contract, has been introduced into those provinces by the Courts of Justice as a rule founded in "equity and good conscience." In the case of *Putta-veramier v. Vencatta Row Naiker*, however, the Lords of the Privy Council observed, that, in the absence of any known rule of law, a Court of Justice is not at liberty to qualify the rights and obligations of the parties as defined by their mutual contract. "What is known in the law of England as 'the equity of redemption' depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision." (Per Colvile, Sir James; XIII Moore. Ind. App., 560; VII Ben. L. Rep., 136; XV Suth. W. R., P. C., 37). Their Lordships, however, concluded by observing,—“It must not then be supposed that, in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon.” Since this

judgment was delivered by the Privy Council, the question again came before the High Courts of Bombay and Madras, but the learned Judges thought that a rule of property had been established in those provinces by judicial decisions which ought not to be disturbed, and which the Privy Council never designed to disturb. (Cf. *Shankarbai Gulabbhai v. Kossibhai Vithalbai*, IX Bom. H. C. Rep., 69; *Lakshmi Chelliah Garee v. Krishna Bhupati Devi*, VII Mad. H. C. Rep., 6.)

The question, however, was again brought up before the Privy Council in the case of *Thumbusawmy Mooley v. Hos-*
sain Rothen (I. L. R., I Mad., 1), when their Lordships strongly condemned the action of the Madras, as well as of the Bombay, High Court, of the former since 1858 and of the latter since 1864, as an unjustifiable encroachment on the province of the legislature. Their Lordships pointed out that, according to what may be called the common law of the country, the essential characteristic of a mortgage by conditional sale is that, on the breach of the condition of repayment, the contract executes itself and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them (b). The Judicial Committee further observed that a contract of mortgage, unless modified by actual legislation or established practice, is enforceable according to its letter, and they approved of the decision of the Calcutta High Court in the case of *Surrefunnisa v. Shaik Enayet Hossein* (V Suth. W. R., 88), that Regulation XVII of 1806 had no retrospective operation and could not affect a mortgage by conditional sale which had become absolute according to the strict agreement of the parties before the Regulation came into force. Their Lordships concluded their judgment in these words: "The state of the authorities being such as has been described, it may obviously become a question with this committee in future cases, whether they will follow the decision in the XIII Moore Ind. App., which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay which appears to them to have been its origin radically unsound. On a state claim to redeem a mortgage and dispossess a mortgagee, who had, before 1858, acquired an absolute title, there would be

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(b) The judgment of Westropp, C. J., in *Bapuji v. Sena* (I. L. R., II Bom., 231) is an elaborate attempt to shew that the equity of redemption was recognized by the ancient common law of the country. See also the cases cited in argument in *Doucett v. Wise* (II Ind. Jur., 280).

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suggested.Madras
cases on
point.Right to
redeem.

strong reason for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise. They deem it right, however, to observe that this state of the law is eminently unsatisfactory and one which seems to call for the interposition of the Legislature.

“An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favor of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party.”

The rule which has since been adopted in Madras, is to allow the equity of redemption only with regard to mortgages entered into subsequent to the year 1859, and to disallow it in other cases, although one of the learned Judges protested against this rule of construction on the ground that the course of decisions, with reference to which the parties are supposed to have contracted, could have produced ‘but an infinitesimal effect upon the contracting public in the depths of the country.’ (*Ramasami Sastrigal v. Samiyappanayakan*, I. L. R., IV Mad., 179; *Bapirazu v. Kamarazu*, I. L. R., III Mad., 26; *Thumbusawmy v. Hossain*, I. L. R., I Mad., 1; *Mavulali v. Gundu*, I. L. R., VI Mad., 339; *Mallik v. Mallik*, I. L. R., VIII Mad., 185.) The Bombay High Court, however, has refused to recognize any such distinction and permits redemption in all cases, whether the mortgage was created before or after 1864, although in mortgages created before that year the Court acts in a more liberal spirit towards the mortgagee as regards allowances for repairs, improvements, &c. (*Kanaylal v. Pyarabai*, I. L. R., VII Bom., 139; cf. *Smith v. Sampson*, 7 Moore Privy Council, 205.)

The recognition of the right to redeem was, no doubt, a strong measure at first, due to the influence of English law not always perhaps very correctly appreciated or followed. It seems that the Madras Court, under the impression that the clause of forfeiture was a penal clause, went so far at one time as not to allow a foreclosure in any case but only a decree for sale, but the practice has since been abandoned.

I may here mention that it has been held by the Allahabad High Court, that in the case of a verbal mortgage by conditional sale, the estate becomes the absolute property of the mortgagee immediately on the default of the mortgagor. (*Gobardhan Das v. Gokaldas*, I. L. R., II All., 633). And this judgment would seem to be in strict accordance with the rulings of the Privy Council; the case being unaffected by Regulation XVII of 1806, which applies only to mortgages in writing; parol mortgages being either inadvertently or otherwise left wholly unprovided for.

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We thus find that, in nearly all the provinces of this country, the debtor retains a right to redeem, notwithstanding the non-payment of the money on the appointed day. This right is very jealously guarded, and in England a large number of maxims have clustered round it. One of these is the well-known proposition "once a mortgage always a mortgage." This maxim requires some explanation, as the language in which it is expressed is likely to mislead the student. It means, it is true, that no agreement of the parties can control the right of redemption; but then it has reference only to stipulations entered into *at the time* of the mortgage, and not to agreements entered into subsequently; and, as I shall presently explain, there is good reason for this distinction. The right to redeem, I must tell you, is of the essence of the mortgage, and may not be waived or varied even with the consent of the parties. Any agreement, therefore, at the time of the mortgage, by which the right of redemption is limited, either as to the persons entitled to redeem, or the period within which the right must be exercised, is wholly inoperative. Thus, for instance, if the mortgagor should agree that the right to redeem shall be confined to his life, his heirs after his death will, notwithstanding such agreement, be permitted to redeem. And, as we have already seen, an assignee of the equity of redemption will also be entitled to redeem, notwithstanding the existence of a covenant not to assign by the mortgagor. In fact, no limitation can be successfully imposed on the mortgagor's equity of redemption, a right which the law will not suffer to be clogged or fettered even with the assent of the mortgagor (c).

Maxims on
the point.

(c) It is scarcely necessary to state that the right of the mortgagor to redeem cannot be defeated by any unauthorized acts of the mortgagee, for instance, an exchange or partition made by the latter without the consent of the mortgagor. (*Muzhur Hossein v. Hur Pershad*, XV Suth. W. R., 353; cf. *Oomrao v. Nizam*, I Agra H. C. Rep., 224.)

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case.

In *Ramsorun Lal v. Amirta Kuar* (I. L. R., III All., 369), a purchaser from the mortgagor was allowed to redeem, although the deed said that redemption was to be allowed "only if the mortgagor paid the money from his own pocket without transferring the property. Nor should the same be cancelled if the money was paid or deposited by transfer of the property sold." (*Dukchore v. Hedayat*, Agra H. C. Rep., F. B., 7; *Mahomed v. Bane*, I All. H. C. Rep., 135; *Sheopal v. Deendyal*, V All. H. C. Rep., 145; *Ramroop v. Lalla Thakoor*, XXIV Suth. W. R., 429.) Indeed, it is only in very exceptional cases that the Court would recognize the validity of any such reservation (for an instance, see the English case of *Bonham v. Newcomb*, 1 Vern., 232, where the conveyance was in the nature of a family settlement, 2 White & Tudor, L. C., 1189.) Of course, if the transaction amounts, not to a mere mortgage, but to a sale with a clause for re-purchase, the question would, as I have already explained, have to be decided on a different principle.

The rule that the equity of redemption may not be clogged with a bye-agreement is also illustrated by the recent case of *Mahommed Muse v. Gijibhoy* (I. L. R., IX Bom., 524), where it was held that a condition in a mortgage that if the mortgagor redeems the property, the mortgage right should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent is a condition which cannot be enforced in favour of the mortgagee. It is true such a condition does not absolutely exclude the right of redemption; but it has the effect of fettering it with an onerous obligation, and cannot therefore be enforced as against the mortgagor. The same principle has been applied perhaps with doubtful propriety in some cases in which the mortgagor has been allowed to redeem without paying other debts due to the mortgagee where the language of the deed did not create a further charge, but only amounted to a covenant to pay all existing debts before payment of the mortgage-debt. (*Rama v. Martand*, I. L. R., IX Bom., 236, note. Cf. *Hari v. Balambhat*, I. L. R., IX Bom., 233, where, however, the suit was brought by the assignee of the equity of redemption and not by the original mortgagor (*d*). (But see *Allu v. Roshan*, I. L. R., IV All., 85.)

(*d*) I am not quite sure that such was not also the case in *Rama v. Martand*, although the language used by the Court is very general. See *Yashvant v. Vithoba* (I. L. R., XII Bom., 231; cf. p. 234).

The mortgagee is never allowed to obtain any advantage from his security beyond his principal, interest, and costs. Thus, where the mortgage-deed contained a condition that if the principal were not repaid by a certain day, the mortgage should only be redeemed by payment of a certain quantity of rice for each rupee of the mortgage-money, it was held that the condition was unreasonable and oppressive, and could not therefore be enforced by the mortgagee. (*Mayilaraya v. Subba Roy*, I Mad. H. C. Rep., 81 : cf. *Asapal v. Nunkoo*, III Agra H. C. Rep., 216.) The principle is well illustrated in several English cases in which the Court has refused to give to the mortgagee any collateral advantage not strictly belonging to the contract of mortgage. Thus, where money was lent on mortgage at six per cent., and by a deed of even date the mortgagor agreed to convey, at the request of the mortgagee, ground-rents at twenty years' purchase, the Court decreed redemption on payment of merely principal, interest, and costs. (*Jennings v. Ward*, 2 Vern., 520.) So, again, if a mortgage is made redeemable upon payment of the mortgage-money at a certain day, but with a condition that if the money is not then paid the mortgage shall become absolute, if the mortgagor will pay an additional sum, the estate will notwithstanding be redeemable by the mortgagor until it is regularly foreclosed by the mortgagee. (*Willet v. Winnell*, 2 Vern., 488.) Indeed, English equity has gone so far as to hold that a stipulation at the time of the loan that unpaid interest will be converted into principal cannot be enforced against the mortgagor, and that the abolition of the usury laws has not had the effect of withdrawing the protection which the mortgagor had always enjoyed in the Court of Chancery. (See the cases collected in *White and Tudor's Leading Cases*, Vol. II, pp. 1184-1185.)

But every condition made by a mortgagee with the mortgagor will not be regarded as invalid by the Court, although it might have remotely the effect of fettering the equity of redemption. Qualified restrictions on the remedies of the mortgagor are allowed as well in this country as in England. "The parties may make any conditions or covenants so long as these are not in themselves illegal, as that the mortgagee in possession shall pay the mortgagor a certain allowance or rent; that the loan shall be repayable by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due;

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* * * that after payment of Government revenue and village expenses the mortgagor shall pay to the mortgagee the entire surplus collections, and also all that may be derived from alluvion, and that if in the month of *Jait* in any year, the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession; that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if anything is gained from the same river, the mortgagee shall make an allowance for it; that a third party named, as well as the mortgagor, shall have the right of redeeming; that the mortgagor shall make good the balances of rent unpaid by cultivators * * * ; that the mortgagor not retaining possession shall pay the Government revenue." Macpherson, pp. 134, 135.

Time not of
the essence
of the
contract.

The maxim "once a mortgage always a mortgage" is a logical corollary to the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions. The protection which the law throws round the mortgagor would be wholly illusory if the mortgagee were permitted to restrict the right of redemption within such limits as he might choose to impose on the mortgagor. (*Samathel v. Mather Sri*, VII Mad. H. C. Rep., 395.) The debtor, who agrees to forfeit his property if the money is not paid on the appointed day, might be easily induced by the creditor to waive the benefit which the law has secured to him, and this accounts for the jealousy with which the right of redemption is guarded in every system of jurisprudence. There is a curious case which you will find in the English books in which the mortgagor was permitted to redeem, although he had solemnly sworn never to exercise the right. To the general rule that a mortgagee shall not derive any collateral advantage from his mortgage, English lawyers, however, recognize one exception. An agreement securing to the creditor a right of pre-emption of the equity of redemption is regarded as valid by the English Court of Chancery. I am not, however, aware of any case in which the doctrine has been followed in India.

Restraint
upon right
of redemp-
tion.

I have already said, that the rule directed against any attempt to fetter the equity of redemption applies only to agreements made at the time of the mortgage, as the law presumes that the debtor is then completely at the mercy of the creditor, who, unless restrained by the law, might

impose his own terms, however exorbitant. But the parties are at liberty to contract with one another, in any manner they please, after the execution of the mortgage, although such transactions are not, on other grounds, viewed with favor by Courts of Justice. The distinction, however, between transactions at the time of the mortgage and those subsequent to the mortgage, is extremely important and must be carefully borne in mind. (See the authorities cited in 1 White and Tudor, L. C., p. 188.) I have heard it seriously argued that a mortgagee may not buy in the equity of redemption, and that, except by the process of foreclosure, he cannot become the absolute owner of the pledge. This would, however, be an unjustifiable extension of the maxim, suggested probably by the language in which it is frequently expressed. (*Ranu v. Ramabai*, VI Bom. H. C. Rep., 265, A. C. J.; *Anagi v. Dhundhud*, Bom. P. J., 1874, 133; *Rajcoomar v. Ramsuhaye*, XI Suth. W. R., 151; *Dhunnoo v. Boorhan*, VII Macnaghten's Sel. Rep., 181; *Goordyal v. Hunscoonwer*, II Agra H. C. Rep., 176, but see *Kaseenath v. Bheekaree*, Suth. W. R., F. B., 79. See also the cases cited in 2 White and Tudor, L. C., 1187. I must warn you that legal maxims, as observed by a learned writer, are for the most part were symbols, useful to the lawyer as a kind of technical short-hand, suggesting definite groups of legal facts, but which are only misleading if they are supposed to mean anything else. (Pollock's Essays, 256.) There is another familiar maxim in connection with the subject—"he who seeks equity must do equity;" but I reserve the discussion of this maxim for another lecture.

I propose to discuss in the next place the persons who are entitled to redeem. Now it may be laid down generally that not only the mortgagor himself, but also any person having an interest in, or lien on, the property, is entitled to redeem. As a judgment-debt in this country does not create in itself a charge on land, it is doubtful if a judgment-creditor, merely as such, has a right of redemption. He has, however, only to attach the property, and as an attachment operates as a statutory hypothecation, the attaching creditor acquires the right to redeem the mortgage. The point was substantially decided in the case of *Mohun Lall Sukul*, to which I have already had occasion to refer. (See however *Soobhal Chunder Pal v. Netye Charan Bysack*, I. L. R., VI Calc., 663; *Radhe Tewari v. Bujha Misr*, I. L. R., III All., 413.)

Persons
entitled to
redeem.

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VI.Heir of
mortgagor
entitled to
redeem.

I need hardly add that the right of redemption may be claimed by the heir or devisee of the mortgagor, and, generally speaking, by any person who, either by voluntary or involuntary assignment, succeeds to the whole or a portion of the rights of the mortgagor, in the whole or a portion of the mortgaged property. [*Sheogolam Singh v. Ramroop Singh*, XXIII Suth. W. R., 25; *Kishen Ballabh v. Belasoo Coomar*, III Suth. W. R. (e).]

Beneficiary
lessee enti-
tled to
redeem.

It would seem that a lessee claiming under a beneficial lease is also entitled to redeem. "In this country patnis, zuripeshgee leases, and interests of that nature are very considerable interests in the land, and cannot be looked upon as mere leases for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietorial interests, on the grant of which considerable premiums are paid; and it is only equitable, that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder" (*per* PONTIFEX, J., in *Kasumunnissa Bibee v. Nilratna Bose*, I. L. R., VIII Cal., 79; see also *Byjnath Sing v. Gobardhan*, XXIV Suth. W. R., 210; *Radha Pershad v. Monohur Das*, I. L. R., VI Cal., 317; *Kokil Singh v. Motterjeet*, V Cal. L. Rep., 243; but see *Lalla Durga Pershad v. Lalla Luckman Phalbu*, XVII Suth. W. R., 372; *Sriputtu Churn Dey v. Mohip Naryan Sing*, XIII Cal. L. Rep., 119). The English law would also seem to recognize the right of a lessee to redeem. (*Keech v. Hall*, 1 Smith, L. C., 523.) A third person, to whom the right of redemption has been expressly reserved, may also redeem (N. W. P., 1848, p. 187). So also may a puisne incumbrancer as we have already seen. (*Sankana Kalana v. Virupakshapa Ganeshapa*, I. L. R., VII Bom., 146; *Radha Bai v. Shamva Vinayak*, I. L. R., VIII Bom., 168). But his right to redeem is subject to this condition that he cannot do so without bringing the mortgagor before the Court. The right of the puisne mortgagee to redeem is not, therefore, absolute, as he cannot redeem before he is entitled to foreclose. It will not, perhaps, be out of place here to observe that a person having only a partial interest cannot

Practice of
English
Court of
Chancery.

(e) In *Jugganath v. Apaji* (V Bom. H. C. Rep., 217, A. C. J.), a donee from a Hindu widow of the equity of redemption was not allowed to redeem; but the case was a peculiar one, and cannot safely be followed. As one of the learned Judges pointed out, there was only a very small interest involved in the suit and a vast amount of litigation in store, if the point was decided in favour of the donee.

redeem without making the others interested parties to the suit. (*Gansavant v. Narayan*, I. L. R., VII Bom., 467; *Henley v. Stone*, 3 Beav., 355.) A surety is also entitled to redeem by virtue of his right to avail himself of the creditor's securities. I may mention that even a creditor or legatee will be allowed to redeem if a case of fraud or collusion is made out (f).

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This is the present state of the law in Bengal, which has been gradually built up on the provisions of the 17th Regulation of 1806, which impose upon the mortgagee the necessity of serving the foreclosure proceedings upon the "mortgagor or his legal representative," an expression which, as we have already seen, has been held by judicial interpretation to embrace every person who claims an interest in the mortgaged property. There is no statutory enactment in the other provinces, but the law, as it is administered at the present day by the Courts of Justice, is, in this respect, substantially the same as in Bengal, both being very largely shaped by the practice of the English Court of Chancery.

Bengal
Law.

Law in the
other pro-
vinces.

A mortgagee may not allege that the title of the mortgagor is defective. (*Tasker v. Small*, 3 My. & Cr., 70; *Abdoolrujjuk v. Sadik Ali*, IV & V Agra H. C. Rep., 142; 1 Spence's Equity, 669.) But although he is estopped from disputing the title of the person who made the mortgage, he may put any person claiming derivatively from the mortgagor, to proof of his title. The mortgagee is not bound to give up the property to any person who may start up with the allegation that he has succeeded to the rights of the original mortgagor; on the contrary, it is his duty to admit no claim upon it until assured of the title of the claimant. (*Keenhya Lall v. Syud Dadalee*, S. D. A., 1859, p. 1273.) No person will be entitled to redeem at his peril, leaving the rightful owner to recover against him (1 Spence's Equity, 668; *Jhuver Bhai v. Narain*, Bom. P. J., 1874, 1.) It seems that the purchaser of the equity of redemption from a Hindu widow, will be bound to prove that the alienation was justifiable under the Hindu Law. (*Dhondoo v. Balkrishna*, I. L. R., VIII Bom., 190.) A *prima facie* title, however, will be sufficient, as the decree in an action for redemption does not bind third persons

(f) It ought to be noticed that a person claiming under an assignment *pendente lite*, cannot bring a suit to redeem. (*Ramchundra v. Mahadaji*, I. L. R., IX Bom., 141.)

LECTURE VI. (Fisher's Mortgage, p. 674). And it seems, a person originally with an imperfect title will be allowed to redeem if a perfect title is established at the hearing. (*Krishnaji v. Ganesh*, I. L. R., VI Bom., 139.) Then again, a mortgagee has only a right to be satisfied that the person claiming to redeem is not an absolute stranger, and cannot avail himself, for instance, of the objection that the plaintiff has not paid the full amount of the purchase-money to his vendor, the mortgagor. (*Heera Singh v. Raghunath*, IV & V Agra H. C. Rep., 30.)

Mortgage security indivisible.

It is necessary to observe that a mortgage security is indivisible, and that no one is entitled to redeem a part of the estate in mortgage on payment of a proportionate amount of the debt secured by the mortgage; you must either redeem the whole, or not at all. Thus, if four brothers, each of whom is entitled to a fourth share of an estate, mortgage it to a creditor as security for a debt contracted by them, one of the brothers cannot redeem his share on payment only of a fourth part of the debt secured by the mortgage. He would, no doubt, have a right to redeem the whole, but he cannot redeem a part, although there may be no question as to the extent of his share. (See *Mujeedoonissa v. Dildar*, XIV Suth. W. R., 216; *Chandika v. Phokar*, I. L. R., II All., 906; *Balambhat v. Sitaram*, Bom. P. J., 1883, 312; *Bhugwun v. Mahomed*, IV All. H. C. Rep., 161; *Hashim v. Ajeet*, Suth. W. R., 1864, 217; *Ram Baluk v. Ramlal*, XXI Suth. W. R., 428; *Hureehur v. Dabee Sahoy*, Suth. W. R., 1864, 260; *Razee-oodeen v. Jhubboo*, Suth. W. R., 1864, 75; *Saligram v. Barun Rai*, IV All. H. C. Rep., 92.)

Case of several mortgagors.

I ought to mention that one of several mortgagors on redemption of the whole mortgaged property will be entitled to a lien on the shares of his co-mortgagors. The purchaser of part of an estate under mortgage, for instance, is entitled to redeem the whole, if the mortgagee insist on it, and in that case he puts himself in the place of the mortgagee redeemed, and acquires a right to treat the original mortgagor as his mortgagor, and to hold that portion of the estate in which he would have no interest but for the payment as a security for any surplus payment he may have made. [*Asansab Ravuthan v. Vamana Raw*, I. L. R., II Mad., 223; *Punchum Sing v. Aliahmad*, I. L. R., IV All., 58; see also *Gobindpershad v. Dwarkanath*, XXV Suth. W. R., 259; *Vithal Nilkanth v. Vishvasrab*, I. L. R., VIII

Bom., 497; *Hirachand v. Abdul*, I. L. R., I All., 455; *Ganesh v. Raghu*, Bom. P. J., 1880, 300; *Pandji v. Sadashib*, Bom. P. J., 1881, 57, and the cases collected in Macpherson's Mortgage, pp. 342-343 (g).]

You will, no doubt, find in the books several cases in which a mortgagor has been permitted to bring a suit for possession of a portion of the mortgaged property, on the allegation that the whole of the debt secured by the mortgage has been satisfied. These cases, however, are no real exception to the rule that a mortgage-debt is indivisible, for in the cases to which I refer, there is no longer any debt due to the mortgagee. (*Hurdeo v. Guneshee Lall*, I Agra H. C. Rep., 3; see also I Agra, 36; IV Agra, 33.) In every such suit, however, the co-mortgagors should be placed on the record as defendants if they refuse to join in the action; but the plaintiff will be entitled to recover possession of his own share only. (*Fukir v. Sadat*, I. L. R., VII All., 376. But see *Mirza Ali v. Tara Soonderee*, II Suth. W. R., 150.) It is necessary that all the parties should be before the Court, as the mortgagee might otherwise be harassed by twenty different suits, and although the language used by the Court in some reported cases is not free from ambiguity, I do not think that it was ever intended to lay down the broad proposition that one of several mortgagors could sue without bringing in his co-mortgagors (h). (*Ragho v. Balkrishna*, I. L. R., IX Bom., 128.)

Cases in which the interests of the mortgagors appear to be distinct and separate on the face of the instrument, are sometimes supposed to form an exception to the rule that a mortgage-security is indivisible. There is, however, no foundation for the notion except some carelessly reported dicta in *Mulik Basab v. Dhana Bebee* (VIII N. W. P., 220), and *Ramkristo v. Ameeroonisa* (VII Suth. W. R., 314) (i). It is true an instrument may be so worded that each of the mortgagors

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Redemption of portion of mortgaged property.

Case of interest of mortgagor's being distinct.

(g) As to form of the decree where the co-mortgagors are not parties, see *Ganpati v. Damodar*, Bom. P. J., 1874, 2.

(h) As to the Court in which such suits should be brought, the law cannot be said to be quite settled, and, this is mainly owing to the difficulties inseparable from a system in which the jurisdiction of Civil Courts is regulated by the value of the subject-matter in dispute. (*Gobind Singh v. Kallu*, I. L. R., II All., 778; *Bahadur v. Nawab*, I. L. R., III All., 822; *Amanat v. Bhajan*, I. L. R., VIII All., 438; *Rupchand v. Balbhant*, I. L. R., XI Bom., 591, and the cases there cited.

(i) See also the cases cited in Macpherson's Mortgage, p. 348; the law laid down in these cases seems, however, to be extremely doubtful.

LECTURE VI. may redeem his share on payment of a rateable portion of the mortgage-debt. (For instances, see *Ramsaran v. Amrita Kuar*, I. L. R., III All., 369; *Sheogolam v. Ramrup*, XXIII Suth. W. R., 25.) But such a clause is seldom, if ever, found in a mortgage-deed, and cannot safely be inferred merely from a recital of the different shares of the mortgagors in the document. Similarly, if a mortgage is made to two persons jointly, the mortgagor cannot redeem without discharging the whole debt, although the deed may specify the proportions in which the mortgage-money is owned by the mortgagees. (*Iman Ali v. Oograh Sing*, XXII Suth. W. R., 262.)

Effect of
mortgagors
purchasing
portion of
mortgaged
property.

Contribu-
tion.

To the general rule, however, that a mortgage must be redeemed entirely or not at all, there is one well-known exception, and that is where the equity of redemption in a portion of the mortgaged property becomes vested in the mortgagee himself. In such cases the mortgage-security is broken up, and the mortgagor or his representatives become entitled to redeem on payment of a proportionate part of the debt charged on the property. Thus, where two villages were mortgaged by the same instrument as security for one sum, and they were both subsequently sold under an execution against the mortgagor, and one of them was purchased by the mortgagee himself, and the other by a third person, the execution-purchaser was allowed to redeem on paying a proportionate part of the mortgage-debt. As pointed out by Morgan, C.J., in giving the judgment of the Court in *Mahtab Singh v. Misree Lall*,—"A mortgagee is entitled to say to each of several persons who may have succeeded to the mortgagor's interest that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this, that a mortgagee, who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage-debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it." (II Agra H. C. Rep., 88; see also *Nathu Sahu v. Lalla Ameer Chund*, XXIV Suth. W. R., 24; *Bisheshar Singh v. Laik Singh*, I. L. R., V All., 257; *Ali Khan v. Mahomed*, Bom. P. J., 1881, 319; *Sakaram v.*

Gopal, Bom. P. J., 1883, 51; *Kesree v. Seth*, II All. H. C. Rep., 4 (j). Similarly, where an usufructuary mortgagee of different plots of land abandoned his possession of one plot and took a lease from the purchaser of that plot, it was held that the mortgagee had, by his own conduct, destroyed the individuality of the original contract and the purchaser of the other plot was let in to redeem on payment of a proportionate part of the mortgage-debt. [*Marana Ammanna v. Pendiyaalla Perubotulu*, I. L. R., III Mad., 230; cf. *Subramanyan v. Maudayan*, I. L. R., IX Mad., 453 (k).]

These cases, however, must be carefully distinguished from another class of cases with which they may be easily confounded. The principle laid down in *Mahtab Sing v. Misree Lall* (II Agra H. C. Rep., 88) will not apply to a case in which the equity of redemption of a portion of the mortgaged property becomes vested in one or more only out of several mortgagees, and the reason of this distinction is obvious. Where the whole estate as to one portion of the pledged property becomes vested in the mortgagee, or in all the mortgagees, if there are more than one, the mortgagor, if compelled to redeem on condition of paying the whole debt, would have an action for contribution for the excess payment, and thus two suits would be necessary in the place of one for the purpose of finally settling the rights of the parties. This reason, however, which is founded only upon grounds of convenience, does not hold good where the purchaser happens to be one of several mortgagees. In such a case the other mortgagees could not be sued for contribution, and they might very reasonably

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—
Case in which portion of equity of redemption is vested in a mortgagee.

(j) The dictum of Jackson, J., in *Hirdy v. Allooia* (I. L. R., IV Calc., 72), cannot be supported, as the mortgagee did not in that case buy merely the equity of redemption.

(k) In England, where there are several mortgagees, and the first is also part owner of the equity of redemption, the judgment directs that, upon payment to the first mortgagee of all that is due to him by the second, the former shall convey the whole estate, subject to his right to redeem the part in the equity of redemption whereof he is interested; on default of payment, the second mortgagee is foreclosed in the usual manner. The owner of the residue of the equity of redemption redeems on payment of all that is due, but receives a conveyance only of that part in which he is interested. But query if he ought not to have a conveyance of all, subject to the right of the first mortgagee to redeem his share of the equity again, upon payment of a proportion; on the principle that the mortgagee must be entirely redeemed, or not at all; or whether, to avoid such a circuitry, the part owner of the equity ought not, in the first instance, to redeem the mortgagee on payment of a sum proportioned to the redeeming party's share (Fisher 944).

LECTURE
VI.

*Ahmed Ali
v. Jowhir
Sing.*

complain if by the acts of one of them the indivisible nature of the security was altered. Where, therefore, one of several mortgagees purchases a part of the property mortgaged, the case is governed by the general rule, and the purchaser of another part has no right to redeem except on payment of the whole of the mortgage-debt. (*Sobha Sah v. Inderjeet*, V All. H. C. Rep., 149; *Mahtab Rai v. Sant Lal*, I. L. R., V All., 276.)

We have seen that when the mortgagee, or if there are more than one, all of them jointly purchase the equity of redemption in a part of the mortgaged property, they cannot insist upon the payment of the whole of the debt secured by the mortgage as a condition of the redemption of the rest of the mortgaged property. Questions, however, of considerable difficulty sometimes arise when the equity of redemption in a portion becomes vested in the mortgagee, while that in the rest passes to two or more different persons. In the case of *Nawab Ahmed Ali Khan v. Jowhir Sing*, the estate having been sold subject to mortgage to different persons, one of them being the mortgagee himself, a purchaser of a portion of the mortgaged property sought to redeem his share on payment of a rateable part of the mortgage-debt. The purchasers of the other portions were not parties to the suit, and on the mortgagee insisting that the plaintiff could not succeed without an offer to redeem the portion which had passed to the other purchasers, the Court refused to make any decree for redemption, being of opinion that the mortgagee had a right to insist upon the redemption of the whole of the property, with the exception of that purchased by himself, on payment of a proportionate part of the mortgage-debt. (N. W. P., 1864, p. 425.)

Privy
Council
decision on
the point.

You will observe that all that the Court ruled in the above case was, that the plaintiff was *bound to offer* to redeem the whole of the estate with the exception of that purchased by the defendant, and not that he was *entitled* to do so if the mortgagee should refuse to part with the shares of the other persons. The distinction is important and is well illustrated by the judgment of the Privy Council in the subsequent suit for redemption between the same parties, in which the plaintiff claimed to redeem the whole of the mortgaged property with the exception only of the portion which had passed to the mortgagee. The defendant, while conceding to the plaintiff the right to redeem the portion which had been purchased by him, resisted his

right to redeem the rest. The Court below, being of opinion that the mortgagee could not be permitted to turn round after having "forced the plaintiff to bring the second suit," made a decree for redemption in the terms of the prayer in the plaint. (*Nawab Ahmed Ali Khan v. Jowhir Sing*, I Agra H. C. Rep., 3.) From this decree there was an appeal to the Privy Council, when the mortgagee again insisted upon his right to retain possession of that portion of the estate which had not been purchased by the plaintiff. In giving judgment their Lordships observed:—"The remaining question is what, upon the facts found by the Courts below, ought to have been their decree. The appellant now complains that the plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, *i.e.*, to put themselves in his shoes as mortgagee in respect of these villages; and further, that the decrees were wrong in refusing to treat him as the owner under a subsequent purchase of three-fourths of Rookumpore.

"The first objection does not come with a good grace from the appellant, who defeated the plaintiffs' former suit, on the ground that they had not offered to redeem the villages in question, and who, in this very suit, has included in his calculation of the amount, which, as he alleges, ought to have been brought into Court, the shares of the mortgage-debt which he said were chargeable on those villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question; it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee in them against his will. It is unnecessary to determine in this suit whether, in the peculiar circumstances of this case, the former proposition is correct. Their Lordships are of opinion that the latter cannot be supported. They think that the appellant, if desirous of retaining possession of these villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represents the portion of the mortgage-debt chargeable on that village." (XIII Moore Ind. App., 404; XIV Suth. W. R., P. C., 20.)

LECTURE
VI.

Allahabad
case on the
point.

You will observe that the Judicial Committee refused to express any opinion as to the correctness or otherwise of the proposition laid down by the Sudder Dewany Adalat in the previous suit. The latter ruling, however, has since been followed by our Courts, and it certainly does not seem to be open to any serious objection. [*Saligram v. Barun Rai*, IV All. H. C. Rep., 92 (l).] A mortgagee, by purchasing a portion of the mortgaged property, does, no doubt, destroy the indivisible character of his security to a certain extent; but it would be going too far to hold that the indivisibility of the debt was absolutely destroyed, so that any one of the other persons interested in the equity of redemption might be let in to redeem on payment of the proportion of the debt attributable to the portion in which he himself was interested. To take a simple case, suppose two brothers execute a mortgage of their property. If one of the brothers should die leaving three sons, and the other brother should sell his share in the mortgaged property to the mortgagee, I do not think any one of these sons would be entitled to redeem his share without offering to redeem the shares of the other representatives of the deceased mortgagor.

Right to
redeem
the whole.

This principle, however, applies only where the mortgagee himself becomes the owner of a portion of the mortgaged property. The general rule on the subject undoubtedly is that a person who has any right to redeem at all has a right to redeem the whole of the mortgaged property, and the mortgagee cannot compel him to redeem only the part in which he may be interested. In a very recent English case it appears that real and personal estate were mortgaged together. On the death of the mortgagor, who died leaving a will of personalty, but intestate as to real estate, the executrix claimed to redeem the whole of the mortgaged property, which claim was resisted by the mortgagee, who insisted that her only right was to redeem the mortgaged personalty on payment of a proportionate part of the mortgage-debt. But the defence was not allowed by the Court, and the mortgagee was directed, on payment of what was found due on his mortgage, to convey and assign the mortgaged properties, real and per-

(l) The right of one of several mortgagors to redeem cannot, however, be defeated by the conduct of the mortgagee *post litem motam*, either by the purchase of a share in the equity of redemption pending a suit for redemption, or by any partial redemption allowed by him. (*Narohari v. Vithal*, I. L. R., X Bom., 648.)

sonal, to the plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. In the course of the argument Lord Justice Cotton asked, if there was any case where the owner of one of two estates, comprised in the same mortgage, had been compelled to redeem that one estate separately; and in giving judgment the learned Judge said: "The mortgage comprises two properties, one of which, subject to the mortgage, belongs to the executrix. She, therefore, is entitled to redeem, but to redeem what? The appellant says 'to redeem the one estate which belongs to her.' But there is no precedent for that. The owner of the equity of redemption in one of two estates comprised in the same mortgage cannot claim to redeem that estate alone. The mortgagee might refuse to allow him to do so. So, on the other hand, the mortgagee cannot compel him to redeem that estate alone—he is entitled to redeem the whole, reserving the equities between him and the other part-owner—he can redeem the whole, leaving the rights of the other parties interested in the equity of redemption to be decided afterwards. The case of *Pearce v. Morris* (L. R., 5 Ch. D., 227) is an instance of this—the owner of one-fourth of the equity of redemption was allowed to redeem the whole, leaving open the rights of the owners of the other three-fourths as between them and the party redeeming." Lord Justice Lindley added—"The plaintiff is the executrix of a mortgagor, and asks to be allowed to redeem the whole of the mortgaged property. The defendant asks us to declare that the plaintiff is entitled to redeem only the personal estate. Now has the plaintiff a right to redeem a part of the mortgaged property? I think clearly not, except as a matter of arrangement; neither can she be compelled to redeem part. A person who has any right to redeem, has a right to redeem the whole of the mortgaged property, and not a part of it, unless there is a special bargain." (*Hall v. Howard*, 32 Ch. D., 436 (m); *Ramkrishna Manjee v. Amirunnessa*, VII Suth. W. R., 314.

*Hall v.
Howard.*

(m) I may mention that the heir-at-law was not a party to the suit, but the Court thought that as he was not known, the objection was not a substantial one, and that it would be a new departure and contrary to the spirit of recent legislation to refuse redemption altogether until he could be found and made a party; as to the necessity of making all persons interested in the equity of redemption, ordinarily, parties, see *Ragho Salvi v. Bal Krishna Sukha Ram*, I. L. R., 9 Bom., 128, in which however the question of the plaintiff's right to redeem, although raised, was not decided by the Court.

LECTURE VI. Cf. *Wuzeerunessa v. Bebee Saldun*, VI Suth. W. R., 240; *Mirza Ali Reza v. Tarasundry*, II Suth. W. R., 150; *Asansab v. Vamana*, I. L. R., II Mad., 223; cf. *Bitthul Nath v. Toolseeram*, I Agra H. C. Rep., 125, where redemption was allowed of the whole with the exception only of the share which had been bought by the mortgagee, and this, although the mortgage-debt had been satisfied; the case, however, was decided before the Privy Council judgment in *Nawab Azimut Ali's case*, XIII Moore Ind. App., 404, and may not be safely followed.)

Bombay
decisions
on the
point.

An exception has, however, as we have seen, been grafted on the general rule by the case of *Nawab Azimut Ali Khan v. Zookur Singh* (XIII Moore Ind. App., 404.) Considerable difficulty, however, has arisen in defining the true limits of the exception, and there are conflicting dicta, if not decisions, on the point. In the opinion of the Bombay High Court, the exception applies only where the mortgagors are the owners of distinct parcels, and not where they are either joint tenants or tenants in common; but the Allahabad High Court apparently recognizes no such distinction. (*Kuray Mal v. Puran Mal*, I. L. R., II All., 565.) Referring to the judgment of their Lordships of the Privy Council in *Nawab Azimut Ali's case*, Sir Charles Sargent observes in the case of *Shakeram v. Gopal* (I. L. R., X Bom., 656 note): "The ground of that decision we apprehend to be that the plaintiffs were only the owners of a distinct village comprised in the property mortgaged, and not sharers in the whole of such property. In the case, however, before the Court of Allahabad, the owners of the equity of redemption were tenants in common, and except as to the share purchased by the mortgagee, there would appear to have been no reason for departing from the ordinary rule, that one of several tenants-in-common may redeem the whole, as was practically decided, under similar circumstances, in the case to which our attention has been drawn by Melvill and Kemball, JJ." (*Alikhan Dandkhan v. Mahomadkhan Samsher Khan*, I. L. R., X Bom., 658, note. See also *Narahari Vitalvat*, I. L. R., X Bom., 648; cf. *Ragho v. Balkrishna*, I. L. R., IX Bom., 128.)

Bombay
cases con-
sidered.

I must, however, confess I find some difficulty in understanding the distinction taken by the Bombay High Court between a case in which the mortgaged property is held in severalty and one in which it is held in common tenancy.

The mortgagee, by becoming the owner of a portion in the equity of redemption, acquires at least the same right to redeem the shares of those who do not join in the action as the plaintiff in the case, and there ought to be no distinction in principle between a case in which the mortgaged property is held in severalty and one in which it is held in common. The case of a joint tenancy, no doubt, presents greater difficulty. It is clear that in the case of a joint tenancy, none of the coparceners can redeem any particular share before partition. (*Gansabant v. Narayan*, I. L. R., VII Bom., 467.) The real difficulty, however, lies in saying whether the plaintiff should be allowed to redeem the whole property, leaving the mortgagee to have his rights ascertained and defined in a suit for partition, or whether the suit of the plaintiff for redemption should be dismissed, reserving to him the right to enforce a partition, or whether a prayer for partition and redemption may not be combined in the same suit. A question of this kind arose in the case of *Moraker Akuth v. Punja Patath* (I. L. R., VI Mad., 61), where a suit was brought to redeem the whole of the mortgaged property by one of the mortgagors, a portion of the equity of redemption having been acquired by the assignee of the mortgagee in possession of the property. The original Court gave the plaintiff a decree, but only for the recovery of his share of the lands on payment of a proportionate amount of the mortgage-debt. On appeal, the Subordinate Judge gave the plaintiff a decree for all the land on payment of the whole mortgage-debt. On appeal to the High Court, it was contended by the mortgagee that he was only bound to surrender to all the co-owners of the land jointly, and that at any rate his right to a share in the land ought to have been determined in the suit. The High Court allowed the appeal and dismissed the plaintiff's suit, on the ground that to allow plaintiff to redeem the whole would enable him to get possession of the property to the exclusion of the mortgagee who was in possession and had a share in the right to redeem. The Court was of opinion that the mortgagee could not be required to surrender possession of the whole against his consent, until the plaintiff had, by a proper suit for partition, ascertained definitely to what shares in the property he and the mortgagee were respectively entitled. A decree for redemption of a portion was also disallowed upon the ground, that it could not be given without converting the suit into a suit for partition, which

LECTURE
VI.Method of
redemption.Bengal
law.

Foreclosure.

the Court was unable to do without the consent of all the parties interested in the property.

I shall now proceed to consider the method by which redemption may be accomplished, and I propose, in the first instance, to state the law as it is administered in this Presidency. Now the mortgagor may either assert his right of redemption actively, or he may be proceeded against by the mortgagee seeking to foreclose, when the mortgagor may prevent a foreclosure by the repayment of the debt within a limited time. For reasons which are obvious, except when the mortgagee is in possession, a mortgagor seldom, if ever, takes any steps to redeem the mortgage till the mortgagee applies for foreclosure. Section 7 of Regulation XVII of 1806, however, applies as well to cases in which the mortgagee is in possession as to those in which the mortgagor has never parted with the possession of the pledge. That section provides, that "when the mortgagee may have obtained possession of the land on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged,—or, when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent with any interest due thereupon shall entitle the mortgagor and owner of such property or his legal representative of the redemption of his property. Instead, however, of paying or tendering the money to the mortgagee, the debtor may deposit the money in the Dewany Adalut of the zillah in which the property is situated."

In the last lecture I had occasion to refer in some detail to the provisions of the 8th section of Regulation XVII of 1806, which relates to foreclosure. That very section points out the method by which a foreclosure may be prevented, and the redemption of the mortgage accomplished, by the mortgagor. When an application for foreclosure is made, the mortgagor is bound to pay to the mortgagee, or to deposit in the Dewany Adalut, the principal, or the balance, if any part of the principal shall have been paid, together with interest (*n*), if possession has not

(*n*) If the deed is silent as to interest, payment of the bare principal will be sufficient to bar foreclosure. (*Radhanath v. Bungo Chunder*, Suth. W. R., 1864, p. 157; *Roopnarain v. Madho*, Marsh., 617.)

been taken by the mortgagor. It is not necessary that the costs incurred by the mortgagee in the matter of the mortgage should be paid. (*Zulens Ray v. Deb Shahu*, Marsh., 167.) And it would seem that a deposit in the terms of the Regulation would be sufficient even if there is an agreement, that money spent in improvements should be paid by the mortgagor to the mortgagee (N. W. P., 1853, page 161); nor would it be necessary for the mortgagor to deposit any money as interest where the mortgage-bond provides that the rents were to be taken in lieu of interest although the mortgagee was unable to obtain possession; the object of the Regulation being, as pointed out by the Court, to render as definite and precise as possible the amount which has to be deposited [I. L. R., III All., 653; VIII N. W. P., 441 (o).] But the tender or deposit, in order to be good, must be unconditional. It must not be made in such a way as that its acceptance will impose a condition upon the creditor, or supply evidence of an admission that no more is due than the amount tendered or deposited; and I need hardly add, that, as it is the very essence of a tender that the person to whom it is made should be at liberty to take the money at once, a deposit under the Regulation, which takes the place of a tender, must necessarily be bad if accompanied by a protest that the money should not be paid away

LECTURE
VI.Regulation
XVII of
1806.

(o) A question of some nicety, as to the right of a mortgagee to claim interest as part of the mortgage-debt, was discussed by the Allahabad High Court in the recent case of *Allah Buksh v. Sada Sur* (I. L. R., VIII All., 182).

A deed of mortgage by conditional sale executed in 1872, giving the mortgagee possession, contained the stipulation that the principal money should be paid within ten years of the date of execution of the deed, and that in default of such payment the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest it has been agreed that the mortgagee has no claim to interest and the mortgagor has none to profits." The mortgagee however did not obtain possession.

In 1878 the mortgaged property was purchased by the appellant at a sale in execution of a decree. In 1884 the mortgagee brought a suit for foreclosure against the purchaser and heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest. It was held that whatever claim he might have against the mortgagors for damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land which had passed free from charge or interest to the purchaser. It would seem that the deposit of the principal alone will be sufficient where the mortgagee has obtained a decree for possession and mesne profits, whether he executes it or not. (*Sakriaran v. Dharam*, III Ben. L. Rep., 141, A. C. J.)

LECTURE VI. to the mortgagee immediately. (*Goluckmonee Debea v. Nobongomonjoree Debea*, Suth. F. B., 14; see also S. D. A., 1847, p. 462; S. D. A., 1848, p. 897; S. D. A., 1859, p. 852.)

Deposit
with pro-
test.

A somewhat different question arises when the deposit, instead of being clogged with any condition, is merely accompanied by a protest that the money is not due, and that the mortgage-deed is invalid. The question actually arose in the case of *Prannath Chowdhry v. Rookea Begum*, which was heard in the last resort by the Privy Council, and in which their Lordships held that such a deposit is bad. In delivering the judgment of the Board, Lord Kingsdown said:—"The remaining objection relates to the payment into Court in the nature of a tender, which was made by the defendant Ramruttun Roy. Ramruttun Roy directed the money to be paid out to the appellant, but at the same time, in his petition to the Court, he disputed the validity of the appellant's title to foreclosure, and expressed an intention, amounting to a notice, to sue the appellant to recover back the very money which he was tendering.

*Prannath
v. Rookea.*

"The meaning of the direction that the money may be paid into Court clearly is, that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title. The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon the acceptance of the money; and though mere words, in the form of a protest, which may accompany a tender, will not defeat, where they can reasonably be regarded as idle words, their Lordship thinks that the proceedings of Ramruttun Roy with respect to the mortgagee's title to foreclosure forbid such an interpretation of his language and his act." (VII Moore Ind. App., 323. See also *Makhun Koar v. Jassoda Kuar*, I. L. R., VI All., 399; *Abdar Rahman v. Kisto Lall Ghose*, VI Suth. W. R., 225. Compare *Babu Gobind Prosad v. Dwarkanath*, XXV Suth. W. R., 259.)

I may mention that this decision has been sometimes criticised as treating a tender with a threat that the money is not due as a conditional tender; but the judgment really proceeds upon the ground that the Indian Regulations contemplate cases in which the relation of mortgagor and mortgagee is undisputed, and that section 7 of Regulation XVII of 1806 was not intended to apply to a case in

which an alleged mortgagor makes, under protest, a tender of money upon a mortgage, the validity of which he refuses to acknowledge. LECTURE
VI.

The tender must be made at a proper time and at a proper place. If no particular place is agreed upon, a personal tender is, generally speaking, necessary. In exceptional circumstances, however, a tender may be good if made at the mortgagee's house or last place of abode, as, for instance, where he is keeping out of the way to avoid the tender (Fisher, 737). It is scarcely necessary to observe that a tender in order to be valid must be a tender of money, except where the parties have agreed impliedly or expressly upon some other mode of discharging the debt, a very strong instance of which is to be found in the case of *Lyons v. Skinner* (N. W. P., 1853, p. 441). In England the law relating to tenders is extremely rigid (*p*), but the rigidity of the English law on the point has been considerably relaxed by the Indian Legislature, and under the Indian Contract Act, it is sufficient if an unconditional offer be made to pay at a proper place by a person in a position to pay. (*Kanye Lall Khan v. Khetter Money*, V Cal. L. Rep., p. 105.)

We must remember that in those parts of India where Bengal Regulation XVII of 1806 is in force, the right to redeem a mortgage by conditional sale is governed by the terms, not of the agreement, but of the Regulation. Where, therefore, the mortgagor deposited only the principal debt and interest for the last year, alleging that interest for the previous years was according to the conditions of the document to be recovered by separate suit,—it was held that his suit for redemption must be dismissed. There had been default in payment of the interest due, and by section 8 of the Regulation, the mortgage, notwithstanding the conditions relied upon, had been finally foreclosed. (*Mansur Ali v. Sarju*, I. L. R., IX All., 20.) I ought to add that in an usufructuary mortgage where there is no stipulation for interest, the usufruct going in lieu of interest, the mortgagee is not entitled to claim any additional sum by way of interest, and, generally, when a deed of mortgage is silent as to interest, payment of the bare principal within

(*p*) See the subject discussed in Fisher, pp. 736—743. The English cases are interesting as illustrating the method adopted by Judges in England in dealing with the embarrassments created by archaic rules, which, however inconvenient, are too firmly established to be directly overthrown by Courts of Justice.

LECTURE VI. the year of grace is sufficient to bar foreclosure. (*Radha-nath Sen v. Bango Chander Sen*, W. R., 1864, p. 157; *Roop-narain Sing v. Madhab Sing*, Marsh., 617; *Gangaprasad Ray v. Enayet*, 16 W. R., 251.)

It may not, perhaps, be out of place here to state that a Judge has no discretion to extend the time allowed to a mortgagor under section 8 of Regulation XVII of 1806. (*Mahammad Gari v. Abdul Mahammad*, V Suth. W. R., Mis., 31.) If, however, the mortgagee takes out the mortgage-money as deposited by the mortgagor within time, he cannot afterwards sue for foreclosure. (*Nowazush v. Woosulunnissa*, 6 W. R., 249.)

It is necessary to observe that only those who are entitled to redeem are able to make a valid tender, as the mortgagee is entitled to retain the property as against all strangers. Where, therefore, an execution-creditor of the mortgagor made a tender on his own account which was refused by the mortgagee, the mortgagor was not allowed the benefit of the tender, on the ground that the execution-creditor who made the tender was not entitled to redeem. *Gopal Lall v. Moharajah Pitambar Singh* (III Selc. Rep., p. 54). A person, however, who has only a partial interest is entitled to make a valid tender. (*Pearce v. Morris*, L. R., 5 Ch., 227, but see *Ram Buksh v. Mohunt Ram*, XXI Suth. W. R., 428.)

Time with-
in which
deposit
must be
made.

We now come to the time within which the money must be tendered or deposited. Now, the Regulation, as you will observe, allows one year from the date of the 'notification,' which has been held to mean from the date of the service and not of the mere issue of the notice. This was decided in the case of *Mohesh Chunder Sein v. Mussamut Tarinee* (X Suth. W. R., F. B., 27). The Court, however, refused to say from what point of time the period should run when the mortgagor cannot be served. There can, however, be little doubt that where substituted service is permitted, the period would run from the date of such substituted service. I may mention that, in calculating the year of grace, the date on which the service is effected is excluded. (*Mohesh Chunder Sein v. Tarinee*, X Suth. W. R., F. B., 27; I Ben. L. Rep., F. B., 14, approved of by the Privy Council, *Norendro v. Dwarkalal*, I. L. R., III Cal., 397.)

Tender or
deposit.

We have seen that the mortgagor is at liberty either to tender the money to the borrower, or to deposit it in Court within the statutory period of one year. If, how-

ever, the Court is closed on the day on which the year of grace expires, a deposit cannot be properly made on the first day on which the Court reopens. In order to save the equity of redemption, it must be made strictly within the year allowed by the Regulation, and the rule would seem to be the same as well when the Court is closed accidentally and unexpectedly, as when it is closed during an authorized vacation. In the case of mortgages, the law allows the mortgagor an alternative, and if he prefer, for his own security, to deposit the money in the Zillah Court, he must avail himself of the privilege at a time when it is within his reach. As observed by the Court in a late case :—" If we were to hold otherwise, we should be allowing the mortgagor to extend the year of grace at pleasure. He might say, ' If I pay the money to the mortgagor, I must do it within one year ; but if I pay it into Court, I shall have thirteen or fourteen months.' " (*Komala Kant Mytee v. Narainee Dossee*, IX Suth. W. R., 583. But see the cases cited in Macpherson's Mortgage, p. 521.)

The class of cases of which the above is an illustration must be carefully distinguished from those in which, by an agreement between the mortgagor and mortgagee, the time for payment is extended beyond the statutory period, and owing to the unexpected closing of the Court, the deposit cannot be made within the time fixed by the parties. This point was decided in the case of *Davi Rawoot v. Heeramoon Mahatoon*, in which the mortgagee having extended the time for repayment to the 25th of November 1863, on which day the Court was unexpectedly closed, the mortgagor deposited the money on the first day on which the Court reopened, and the question arose whether the deposit was made in time to save the equity of redemption. The Court held that the deposit was good ; but in giving judgment the Chief Justice, Sir Barnes Peacock, made certain observations which were certainly not necessary to the decision of the case, and are, perhaps, somewhat open to criticism. The learned Chief Justice is reported to have said :—" The day fixed for payment to prevent a foreclosure of the estate was not a day peremptorily fixed by the law, but a day fixed by the mortgagee himself. Now Courts of Equity, as a general rule, will relieve from forfeiture caused by not doing an act on a day fixed by the parties ; and I think they ought also to relieve when the day is fixed by law, and the act is prevented by some accident which the person to be affected

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Extension
of period.

Sir Barnes
Peacock's
judgment.

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by the forfeiture could not prevent, and which was not caused by any default or misconduct on his part. Courts of Equity will not allow a lessor to forfeit a lease, because the rent is not paid on a particular day." Now, although Courts of Equity are always willing to relieve against forfeitures caused by the non-performance of an act on the day fixed by the parties, I am not aware that there is any instance of the exercise of such power when the time is appointed by statute. Indeed, it is difficult to see how such a power could be exercised without trenching on the province of the Legislature. Take the Statute of Limitations for instance: can it be said that if a plaintiff was prevented by some unforeseen accident, without any default on his part, from suing in time that a Court of Justice would be justified in receiving his plaint. I should, therefore, venture to think that where the period for doing an act is fixed by law, the person who would be affected by the non-performance must perform it within the statutory period at his peril.

There is another observation of Sir Barnes Peacock which would also seem to be open to question. The learned Judge says,—“I should hold that the plaintiff has the option, either of depositing the money in the Judge’s Court, or of tendering it, and that if there is a sufficient excuse for not depositing it in the Judge’s Court, he is not bound to tender the money and prove that tender.” (VIII Suth. W. R., 223.) Now, although the mortgagor may not be bound to tender the money to the mortgagee, he should certainly, it seems to me, deposit it in Court at a time when it is within his reach to do so. The case may be a very hard one when the Court is closed unexpectedly, but the mortgagor who defers payment till the last moment, does not perhaps deserve much sympathy.

Year of
grace.

It very frequently happens that the mortgagee, during the currency of the year of grace, allows an extended period to the mortgagor to repay the debt. In such cases the mortgagor must take care to tender or deposit the money within the limited period, otherwise the mortgage would be foreclosed at the expiration of the stipulated time. (*Goonomonee Dasse v. Parbutty Dasse*, X Suth. W.R., 326.)

Redemption
before
foreclosure.

I have said that the mortgagor may, without waiting till the mortgagee attempts to foreclose, take steps for the purpose of redeeming the mortgage, a right which, however, may not be exercised before the money falls due. (*Burno Moyee v. Benode Mohinee*, XX Suth. W. R., 387.)

I ought to add that, under the Regulations, the mortgagor may, on deposit of the principal, in cases in which the mortgagee has been in possession, call upon the Court to restore the possession of the property to him, subject, however, to an adjustment of accounts between the parties. (Section 2, Regulation I of 1798.) If, however, a less sum is deposited, the mortgagor cannot get back into possession except under a decree in a regular suit, in which all questions arising between the parties may be regularly brought before, and determined by, the Courts of Civil Justice.

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In those parts of the country to which the Bengal Regulations do not apply, the mortgagor may, at any time before foreclosure and after default, bring a suit for redemption against the mortgagee, when the Court takes an account of the amount due on the mortgage-security, and allows the mortgagor a certain period, which is usually six months, to pay the money.

In England, it is an established rule of the Court that if a bill for redemption is dismissed for any reason except for want of prosecution, the dismissal operates as a decree for foreclosure (g). The law, however, cannot be said to be quite settled in India. Of course, if the decree expressly declares that the right of redemption shall be extinguished in the event of the non-payment of the money by a day appointed by the Court, the mortgagor will be foreclosed if he fails to comply with the terms of the decree, but a difficulty arises in cases, and they are by no means of unfrequent occurrence, in which the decree is not properly drawn. In the opinion of the Bombay and Allahabad High Courts, where no definite period for redemption is fixed by the decree, the mortgagor must redeem within the time allowed by law for the execution of decrees, and if he does not do so, the decree will operate as a judgment of foreclosure. (*Gansavant Belsavant v. Narayan Dhond Savant*, I. L. R., VII Bom., 467; *Anrudh Singh v. Sheoprosad*, I. L. R., IV All., 481; *Golam Hossein v. Alla Rukhee*, III All. H. C. Rep., 62; but see *Charta v. Poorum*, II Agra H. C. Rep., 256. A different view, however, has been taken by the Calcutta and Madras High Courts.—*Roy Dinkar Doyal v. Sheo Golam*, XXII Suth. W. R., 172; *Sami Achari v. Somasundram*, I. L. R., VI

(g) It is true that there is a distinction in England between equitable and legal mortgages in this respect, but the distinction does not apply in this country.

LECTURE VI. Mad., 119; *Periandip v. Angapa*, I. L. R., VII Mad., 423; *Kuruthasami v. Juganatha*, I. L. R., VIII Mad., 478. Cf. *Hori Ravji Chiplunker v. Shaperji Hormasji*, I. L. R., X Bom., 461, in which case, however, the question was left open by their Lordships. Distinguish *Radji v. Kaluram*, XII Bom. H. C. Rep., 160.)

It is necessary to observe that a mortgage cannot be redeemed before the fixed time, even though the mortgagor should offer interest during the whole intervening period. (*Brown v. Cole*, 14 Sim., 425.) As a rule, the right to redeem and the right to foreclose are co-extensive, and an agreement that the principal shall not be called in for a definite period will be binding upon the parties. In exceptional cases, however, a redemption may be allowed before the fixed time, for instance, when the period is unduly postponed on the ground of unreasonable bargain (*r*). (*Vatju v. Vatju*, I. L. R., V Bom., 22; *Sakharam v. Vithu*, II Bom. H. C. Rep., 225; *Lilamorji v. Vasudev*, XI Bom. H. C. Rep., 283; *Raghubar v. Budhulal*, I. L. R., VIII All., 95; *Sreemunt v. Krishan*, XXV Suth. W. R., 10; *Chandra v. Iswar*, VI Ben. L. Rep., 562; 1 Spence's Equity, 668.) No doubt in each case the Court must look to the language of the instrument to ascertain whether the parties intended that redemption should take place only at the end of the term or at any earlier period at the option of the mortgagor, but there seems to be a slight conflict of opinion as to the mode in which a mortgage contract in which the principal is payable at a certain date should be construed. In the case of *Setra v. Vairri* (I. L. R., II Mad., 314), it was observed that where a day is fixed for the payment of a debt, and nothing more appears, the presumption is that the day is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period; and in like manner where the mortgage is created as a mere security for the sole purpose of ensuring the payment of the debt at a certain date, the learned Judges said they were not prepared to say that the debtor might not discharge the debt and put an end to the security at an earlier date. (See also *Doruppa v. Kundukeri*, III Mad. H. C. Rep., 363; *Mashook v. Maren*, VIII Mad. H. C.

(*r*) A condition in a mortgage-deed that the mortgage property should only be redeemed on the demand of the mortgagee is one which a Court of Equity will not give effect to. (*Ganpati v. Damodar*, Bom. P. J., 1874, p. 2). It is necessary to add that, under the Deccan Agriculturists' Relief Act, the right to foreclose and the right to redeem are not co-extensive. (*Babaji v. Vithu*, I. L. R., VI Bom., 734.)

Rep., 31; *Nararia v. Kendiala*, I. L. R., III Mad., 230; compare *Puthen Purayil v. Govendam*, I. L. R., V Mad., 310.) But this view is scarcely consistent with the decisions of the Bombay and Allahabad High Courts to which I have already referred, in which it was held that even the use of the words "within a certain number of years" was not sufficient to justify redemption before the expiration of the period mentioned in the deed.

I have already pointed out that the plaintiff must shew, in an action for redemption, a good title to redeem, as the mortgagee is entitled to hold against everybody not having a paramount title, but a mere *primâ facie* title will be sufficient, as the judgment will not conclude adverse claimants.

I now come to the time within which, under the Statute of Limitations, the right of redemption must be asserted. The provisions of the present law are substantially the same as those of the previous Acts; article 148, schedule 2, provides a period of sixty years, commencing from the time when the right to redeem accrues to the mortgagor. The article, however, is subject to the provisions of section 19, by which an acknowledgment, if it fulfilled certain conditions, would give the mortgagor a fresh start.

In the case, however, of a purchase for value and in good faith from the mortgagee, the suit must be brought within twelve years from the date of the purchase. (As to the meaning of the words "purchaser for value and in good faith," see the case of *Radhanath Dass v. Gisborne & Co.*, XIV Moore Ind. App., 1; XV Suth. W. R., P. C., 24.) It is somewhat remarkable that there is no provision in the present Act similar to the proviso contained in section 5 of Act XIV of 1859 by which the mortgagor was bound to sue the purchaser within the time prescribed for a suit for redemption, but there can be no doubt that the mortgagor will not, under the new Act, have an extended period against the purchaser from the mortgagee. The proviso to section 5 of the Act of 1859 was probably inserted out of excessive caution.

It is necessary to observe that the period of sixty years allowed to the mortgagor is wholly irrespective of the nature of the title which the mortgagee in possession may assert. The enactment itself is a departure from the rule that derivative possession is inoperative for purposes of prescription; and I know of no principle on which the

LECTURE VI. law being silent, we should be justified in holding that a derivative possessor could, by his own act, change the character of his possession so as to shorten the period of limitation. But even if there was any doubt upon the language of the Act, the fact that the period may be extended by an acknowledgment shows, that the assertion by the mortgagee in possession of a hostile title would not have the effect of abridging the time fixed by the statute. As pointed out by Mr. Justice Holloway in *Tauji v. Nagamma* (III Mad. H. C. Rep., 137), the period may be extended by an acknowledgment, but by no process can it be curtailed. (See also *Ali Muhammad v. Lulta Baksh*, I. L. R., I All., 655; N. W. P. H. C., 220.) I must, however, confess that this view is perhaps not quite consistent with certain reported decisions of the Calcutta High Court. I shall only notice one of these cases, not only because it was decided by a very eminent Judge, but also because it seems to have been the first case in which it was laid down that the period of sixty years might, under certain conditions, be curtailed. In *Loft Hussen v. Abdul Ali* (VIII Suth. W. R., 476), Mr. Justice Dwarkanath Mitter is reported to have held that, as more than twelve years had elapsed from the date of the expiration of the year of grace, the mortgagor was not entitled to enforce his right of redemption. It was found in the case as a fact that the foreclosure proceedings were regular, and the Court seems to have thought that the mortgagor was bound to assert his right of redemption within twelve years of the expiration of the statutory year of grace. I must, however, confess that I do not understand the reasoning by which the proposition is maintained. A plea founded upon the statute always assumes that the plaintiff has the right which he claims, but that he cannot be permitted to assert the right successfully in a Court of Justice by reason of lapse of time. This being so, I do not see how any proceedings taken by the mortgagee for the purpose of foreclosure could have any other effect given to them than as evidencing a determination by the mortgagee to hold possession, not derivatively as pledgee, but absolutely as owner. But, as I have already endeavoured to explain, the mere assertion of a hostile title by the mortgagee cannot curtail the period of sixty years which the statute allows to the mortgagor to redeem his property (s).

(s) See further on the subject of limitation, App. Statutes, tit. Limitation.

LECTURE VII.

Usufructuary mortgage—What constitutes usufructuary mortgages—Personal liability of mortgagor—Zuripeshgee leases—Difference between Zuripeshgee and ordinary leases—Hanuman Persad Pandey's case—Origin of Zuripeshgee leases—Rights and liabilities of usufructuary mortgagee before and after repeal of Usury Laws—Liability to account—Right of redemption of mortgagor—Simple usufructuary mortgagee not entitled to decree for sale—Limitation.

A **USUFRUCTUARY mortgage** is a very common form of security in this country. The creditor is put into possession of the mortgaged property, the rents and profits going in lieu of interest, or being applied to the discharge of the interest or to the gradual reduction of both principal and interest according to the agreement of the parties (*a*). No formal words are necessary to constitute a usufructuary mortgage, although in this, as in other cases, inartificially drawn instruments not seldom give rise to much useless litigation (*b*). In one case, in which a sum of money being advanced, the person making the advance was put into the receipt of the rents and profits of certain land belonging to the debtor, it was contended that the transaction was not a mortgage, but a mere license to the creditor to receive the rents which might be revoked at any time by the debtor. The Court, however, held otherwise, and directed the creditor to render an account of his receipts as mortgagee in possession. (*Khusul Rai v. Jankee Dass*, II All. H. C. Rep., 9.) Distinguish *Girdhari v. Collis*, VIII Suth. W. R., 497.

A very familiar kind of usufructuary mortgage is one in which the profits are enjoyed by the creditor in lieu of interest, the debtor being entitled at any time to redeem the property on payment of the principal. It closely resembles a Welsh mortgage in its incidents. Another form

(*a*) Where the deed is silent as to interest, there being only a covenant to reconvey on payment of the principal, the presumption is that the profits are to be received in lieu of interest. (*Bunwarree v. Mahomed*, 2 Hay, 150.)

(*b*) For instances, see *Deputy Commissioner of Rae Bareilly v. Rampal Singh* (I. L. R., XI Cal., 237); *Ganga Sahai v. Luchman Singh* (I. L. R., VIII All., 194); *Basant v. Tapeswari* (I. L. R., III All., 1).

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—Zuripesh-
gee.Distinction
between
lease and
mortgage.

of usufructuary mortgage is that in which the creditor is let into possession on the understanding that he is to enjoy the usufruct till the whole debt is gradually liquidated. This kind of security resembles the *vivum vadium* of the English law, a form of mortgage which, although once common, has now fallen into disuse in England. The mortgagor, however, instead of mortgaging his whole estate, may mortgage it for a term of years, and there is one kind of usufructuary mortgage by means of a lease, known as a zuripeshgee, which forms a class by itself, and deserves careful consideration. I shall explain hereafter the origin and nature of this remarkable class of usufructuary mortgages, which possesses a history of its own very interesting to the student of law. But before I do so, I wish to point out that it is not always easy to say whether a transaction is to be viewed as a mortgage, or simply as a lease. I can only ask you to consult the cases on the point, and the only rule that can be safely extracted from them is, that the intention of the parties must be looked into, and that when "once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called." In the case of *Masuk Amin Suzzada v. Marem Reddy* (VIII Mad. H. C. Rep., 34), where, by the terms of the arrangement, a pending suit was compromised and the payment of a balance, ascertained to be due, was secured by the creditor being allowed to occupy the land for fifty-five years at a fixed rent, of which, after deduction of a certain sum for the maintenance of the debtor, the rest was to be applied to the gradual reduction of the debt, which it was calculated would be satisfied in full in fifty-five years, the Court held that the transaction was a mortgage, and that the parties in providing for the gradual liquidation of the debt did not intend to put an end to the relation of debtor and creditor, and that, upon a true construction of the document, it created only a mortgage-security. Now, compare the above case with the case of *Baboo Kowar Sing v. Dullun Amrit Koer* (S. D., 1857, p. 1232), in which there was a lease for twelve years, the lessee advancing a certain sum of money to the lessor, and it being provided that the lessor should be entitled to re-enter on the expiration of the term, the lessee taking his chance of good and bad seasons. It was argued that the transaction was in substance a mortgage, and that the lessee was bound to account as mortgagee in possession. The contention, however, was overruled.

The Court, in giving judgment, observed:—"The point to consider is, whether there was a fair and reasonable prospect of risk to the debt itself in what the banker (mortgagee) undertook; and if so, no question of usury can arise out of it, and for the same reason the possession of the lessee cannot be regarded as that of a mortgagee.

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We think that the deed of Bhurun ijara before us is, in fact, an absolute sale of a lease for a fixed period to which the rules common to mortgage transactions cannot be applied, as the extinction of the original debt is not solely dependent on the receipt of adequate profits, but on profits, whatever they may be, during the continuance of the lease. Should they fail, the debt is neither realizable from, nor secured by, any other resources. This is no device but a substantial risk, entitling the lender to any benefit from the bargain." (Cf. *Perlathail v. Mankudi*,

I. L. R., IV Mad., 113, where it was held that the Madras Regulations regarding interest do not apply to an *illadwara* mortgage which secures to the mortgagee the use and occupation of the land for a long term, and amounts to a lease of the property for the period agreed upon.)

Madras
cases on the
point.

In a recent case (*Satrucherla v. Vairicherla*, I. L. R., II Mad., 314), the Court said: "Where a day is fixed for the payment of a debt and nothing more appears, the presumption is that the date is fixed for the convenience of the debtor; and that he may repay the debt at an earlier period, and, in like manner, where the mortgage is created as a mere security for the sole purpose of ensuring the payment of the debt at a certain date, we are not prepared to say that the debtor may not discharge the debt and put an end to the security at an earlier date, but where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage. Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term; but the creation of a term is by no means conclusive on this point. It may be apparent from the express terms of the other conditions of the contract, or by implication, that the parties intended that redemption should be allowed at an earlier period, as, for instance, when the debt had been

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discharged in a manner contemplated by the parties, and the purpose for which the term had been created thus satisfied, and this is apparently the ground on which the decision in *Dorappa v. Kundukuri* proceeded. In each case, then, the Court must look to the language of the contract to ascertain whether the parties intended that redemption should take place only at the end of the term, or at any earlier period at the option of the mortgagor.

"The lower Appellate Court has found that in this case the parties intended that the mortgagee should remain in possession until the end of the term, and we are not prepared to hold that, in coming to that conclusion, it has misconstrued the contract. Not only is a term created, but it is apparent that the parties contemplated the discharge of the debt and interest in the manner expressed in the deed, and in no other manner.

"There is no agreement for the payment of interest at an annual rate; but the parties have agreed that for the term a lump sum, equal to the principal, shall be accepted as interest, and that a small balance of rent shall then be paid, thus contemplating and providing for a settlement at the end of the term. Taking that net annual usufruct at a fixed sum, a term of years is created, during which the debt and interest are to be liquidated by that usufruct, the risk of seasons and the payment of quit-rent being undertaken by the mortgagee. Hence it is only reasonable to conclude that the basis of the contract was the enjoyment of the mortgaged property by the mortgagee for the period stipulated." (Cf. *Dorappa v. Kundukuri*, III Mad. H. C. Rep., 363).

Usufructu-
ary mort-
gages for
terms of
years.

It is sometimes said that where the principal is risked, the transaction cannot be regarded as other than a lease. This, however, is by no means generally true, and there may be usufructuary mortgages for terms of years, although the parties may expressly covenant that the creditor shall have no claim against the debtor, either for principal or for interest, after the expiration of the prescribed period. It would be impossible to say that the principal was not risked in such cases, but there are several instances in our books, in which such transactions have been regarded as mortgages redeemable on the usual terms.

Personal
liability
of mort-
gagor.

It would seem that in a pure usufructuary mortgage where the mortgagee takes possession of the estate, on the understanding that he shall repay himself out of the rents

and profits, the mortgagor undertakes no personal liability, and the mortgagee must, therefore, look exclusively to the land for the repayment of the debt. In the case of *Thaku Beebee* (S. D. A., 1850, p. 44), which has since been followed, the Sudder Dewany of Calcutta held that, in the absence of any covenant, the mortgagor cannot be sued personally (c). A doubt, however, has been thrown upon this doctrine by the observations of the Privy Council in the case of *Jugjewan Dass v. Ramdass Brijbhukun Dass* (II Moore Ind. App., 487; VI Suth. W. R., P. C., 11). In that case the mortgage-deed contained a clause that the mortgagee should continue to enjoy and appropriate the annual produce till the whole debt was liquidated. Their Lordships observed that the mortgagee would have a full right to recover his debt by reason of the mortgage; and that the clause in question was merely a power for the mortgagee to satisfy himself just as an English mortgagee may by taking possession of the rents and profits. The case, however, can hardly be regarded as an authority for the proposition, that in every pure usufructuary mortgage, the mortgagor incurs a personal obligation to repay the debt. There is a distinction between an English mortgage, with a power reserved to the mortgagee to enter upon possession and satisfy himself out of the rents and profits, and a usufructuary mortgage in this country where there is no covenant by the mortgagor for the repayment of the loan. I have already had occasion to point out that in India there is no implied personal obligation in a mortgage by conditional sale, and the same distinction would also seem to hold good in the case of usufructuary mortgages. I need, however, hardly point out that the mortgagor may expressly agree to be personally responsible, and it would, no doubt, be prudent for the mortgagee to insist upon the insertion of such a covenant by the mortgagor in the deed. (*Munnolal v. Reetbhoobun*, VI Suth. W. R., 283.)

The mortgagor, however, is bound to deliver over possession of the property to the mortgagee, and to secure his quiet possession. If, therefore, the mortgagor refuse, or be unable, to put the mortgagee in possession of the mortgaged property, the mortgagee may sue him at once for the recovery of his money. (*Rajah Odit Perakash Singh*

Mortgagor
bound to
deliver
possession.

(c) See, in passing, *Pohpee v. Cheda*, N. W. P., 1848, p. 211; *Behari v. Phekoo*, I Macnaghten's Sel. Rep., 119. Of course, the rule does not hold good if the profits are to be taken in lieu of interest.

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v. Martindell, IV Moore Ind. App., 444; *Vayalil v. Udaya*, II Mad. H. C. Rep., 315, N. W. P., 1860, p. 280; S. D. A., 1852, p. 193; S. D. A., 1853, p. 59; S. D. A., 1858, p. 306; S. D. A., 1859, p. 58; S. D. A., 1859, p. 322; S. D. A., 1856, p. 849 (*d*). The action, however, would not, perhaps, strictly speaking, be an action for money lent, but for compensation, in estimating which, however, the principal mortgage-money with interest at the rate specified in the contract of mortgage may fairly be taken as a reasonable guide. (*Mohesh Singh v. Chanhoria*, I. L. R., IV All., 245; *Sheo Narayan v. Jai Gobind*, I. L. R., IV All., 281.) Similarly, if the mortgagee should, before the debt has been liquidated, be disturbed in his possession by the mortgagor, or persons claiming under a paramount title, the mortgagee is not bound to bring a suit for possession, but may sue for the balance due to him, and the mortgagor will be personally directed to pay it. (N. W. P., Vol. XI, 115; N. W. P., Vol. VIII, 286; *Balaji v. Dagi*, Bom. P. J., 1884, p. 59; S. D. A., 1859, p. 1181.)

Right
created by
usufructu-
ary mort-
gage, a real
right.

In connection with this topic I may mention that the right created by a usufructuary mortgage is a real right, and that, although the mortgage-deed may contain a covenant for the repayment of the money by the mortgagor in the event of the eviction of the mortgagee, the mortgagee is not bound to sue for the money, but may maintain ejectment, his right to possession as mortgagee not being inconsistent with his right to bring an action against the mortgagor for the mortgage-money. It should seem that if the mortgagee is kept out of possession wrongfully by the mortgagor, he may bring his action for possession, even though the term for which the mortgage was created has expired, as the mortgagor cannot take advantage of his own wrongful conduct. (*Har Sahai v. Chuni Kuar*, I. L. R., IV All., 14.) It is important to observe that though the mortgagor is bound to deliver over the mortgaged property to the mortgagee, and to secure his quiet possession as against all paramount titles, he is not bound by the wrongful acts of third

(*d*) Compare *Baghelin v. Mathura*, I. L. R., IV All., 430, where a claim for interest was allowed, as the mortgagee had been prevented from taking possession. But where a higher rate of interest was stipulated to be paid in the event of the mortgagee not being able to obtain possession of the mortgaged property, the Court held that the mortgagee had, by abstaining from taking possession, waived his right to such higher interest. (*Ganga Sahai v. Lachman Singh*, I. L. R., VIII All., 194.)

persons. His position in fact is analogous to that of a LESSOR in an ordinary lease. [*Jhabbu Ram v. Girdhari Singh*, I. L. R., VI All., 298. Distinguish *Gyaram v. Baroda*, XX Suth. W. R., 484 (e).] In one case, however, where the mortgagor took no steps to protect his title against an execution-purchaser under a decree against a third person beyond putting in a claim, which was unsuccessful, he was held personally liable for the mortgage-debt. (*Perlad Chandi v. Chondi Charan*, S. D. A., 1853, p. 575. Cf. *Anund v. Subul*, S. D. A., 1857, p. 1195.) The decision seems to be based on the duty of the mortgagor to defend his title to the mortgaged premises, or to enable the mortgagee to do so, if he is in possession of the property.

I will now proceed to treat of zuripeshgee leases. A zuripeshgee lease, or a lease for a consideration, is in form a lease by the debtor to his creditor on a fixed rent reserved by the lease, which is generally a little over the amount of interest payable by the debtor. The excess is paid to the debtor, and is called huq aziree, the rest being retained by the creditor in discharge of the interest. The lease is generally for the term during which the loan is to remain out at interest, although there is usually a provision to the effect that, if the loan is not repaid on the appointed day, the lease is to continue for such further period as the debt may remain unpaid, on the same conditions (f). Thus, suppose Rs. 10,000 are lent at 6 per cent. repayable in five years; the interest on the whole sum would be Rs. 600 per annum; the debtor gives a lease of his property for five years at a rent, say of Rs. 650 per annum, the Rs. 50 representing the huq aziree, and the Rs. 600 the interest which the creditor retains under the terms of the agreement between the parties. The excess, however,

(e) If, however, the mortgagee sues for his money, he may be precluded from enforcing his mortgage in respect of any portion of the mortgaged premises. (*Issur Chunder v. Kenaram*, XIV Suth. W. R., 463.)

(f) In *Gouree Shunker v. Bhoolee Pershad* (XVII Suth. W. R., 211), where no fresh term was created, it was held that the words in a zuripeshgee lease, "after the expiry of the term, it will be competent to me (the mortgagor), in the month of Jeit in any year I can, to pay the zuripeshgee and cancel the lease," did no more than bar the mortgagor's re-entering in the middle of any year, in the event of the mortgagee's occupation continuing after the expiry of the lease, owing to the mortgagor's default to pay off the loan, and that it contained no undertaking by the mortgagee to hold on until it quitted the mortgagor to pay him off.

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VII.History of
zuripesh-
gee leases.

instead of being paid to the mortgagor is not unfrequently applied to the gradual reduction of the principal (*g*).

I have already said that zuripeshgee leases have a history of their own. They were originally invented to evade the laws against usury, which continued in the Indian Statute Book from 1793 down to a very recent period, when they were repealed by Act XXVIII of 1855. It is not necessary to dwell at any length on the usury laws, but as they moulded the law of securities on the principles introduced by the Regulations, and as cases sometimes still occur, in which the old law has to be applied, I think it necessary to draw your attention to some of the leading provisions on the subject. Regulation XV of 1793, by

(*g*) A zuripeshgee is not unfrequently merely a mortgage of the rents and profits for the interest due to the mortgagee. (*Nundo Lal v. Mussamat Kulleana Buttee*, Marshal, 209.) It is also necessary to bear in mind that a zuripeshgee lease can, in one sense, be regarded as a mortgage only when the right of redemption is reserved to the lessor expressly or by implication. (*Gopal v. Desai*, I. L. R., VI Bom., 674, distinguish *Dorappa v. Kundukuri*, III Mad. H. C. Rep., 363. See also S. D. A., 1857, p. 1232; S. D. A., 1859, p. 977; N. W. P., 1853, p. 356; S. D. A., 1855, p. 481; S. D. A., 1857, p. 1232.) In some cases, it may be merely a lease for a term, a sum of money being advanced by the lessee as security for the rent to be repaid by the lessor on the expiry of the term. In other cases, and this happens most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the proprietor. The observations of the Madras High Court on Kanams are exactly applicable to zuripeshgee leases on this side of India. Rent is payable in the case of every Kanam, but all Kanams partake also, to a certain extent, of the incidents of a usufructuary mortgage. The mortgagee in all such holdings is assumed to be able to derive from the lands placed in his possession enough to pay the interest, at least of the money advanced. The discharge of the principal is not immediately contemplated. The holder of the Kanam, therefore, pays himself the interest, and also pays the Government tax, either directly or through the landlord. The overplus or a certain fixed amount in grain or money, is paid to the landlord. If, when viewed scientifically, it cannot be wholly regarded as a mortgage, it certainly cannot be wholly regarded as a lease, as undoubtedly the land enures as security, if not for the principal, at least for the interest of the loan advanced. (*Nellaya v. Vada*, I. L. R., III All., 382; cf. *Kamala Naicken v. Pitchacootychetty*, X Moore, Ind. App., 386; *Basant Lal v. Tapeswari Rai*, I. L. R., III All., 4.) On the question, whether a transaction amounts to a lease or to a mortgage, or whether it partakes of the character of both, the following cases may be usefully consulted:—*Rutton v. Greedharee*, VIII Suth. W. R., 310; *Puriag v. Fekoo*, XXX Suth. W. R., 160; *Ishan v. Shujan*, VII Ben. L. Rep., 14; S. C. XV Suth. W. R., 331; *Jowahur v. Sultan*, XII Suth. W. R., 214; *Sheogolam v. Roy Dinkur*, XII Suth. W. R., 215; *Ex-parte Hill*, I. L. R., VIII Calc., 254; *Vanneri v. Patanattil*, II Mad. H. C. Rep., 382; *Mayilaraya v. Subaraya*, I Mad. H. C. Rep., 81; *Setrucherla v. Vairicherla*, I. L. R., II Mad., 314; *Perlathail v. Mankude*, I. L. R., IV Mad., 113; *Kishto v. Bujraj*, 2 Hay, 159; distinguish *Tippayya v. Venkata*, I. L. R., VI Mad., 74; *Mahtab v. Collector of Shahajampur*, I. L. R., V All., 419; *Abdulbharī v. Kashi*, I. L. R., XI Bom., 462.

which the maximum rate of interest was limited to twelve per cent. in the Presidency of Bengal (*h*), after enacting in the 10th section, that all mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum, with the simple interest due upon it, not exceeding twelve per cent., shall have been realized from the usufruct of the mortgaged property, provides in the next section for the adjustment of the accounts in the case of mortgages specified in section 10: "Where the mortgagee shall have had the usufruct of the mortgaged property, the mortgagee is to be required to deliver in the accounts of his gross receipts from the property mortgaged, and also of his expenditure for the management or preservation of it. The mortgagor is to swear, or (if he be of the description of persons whom the Courts are empowered to exempt from taking oaths) to subscribe a solemn declaration, that the accounts which he may deliver in are true and authentic. The mortgagor is to be permitted to examine the accounts, and after hearing any objections he may have to offer, or any evidence that either party may have to adduce respecting them, the Court is to adjust the account."

You will observe that this enactment rendered it extremely difficult for the mortgagee to realize more than twelve per cent. on the principal money. If he entered upon possession, he was liable to account for the rents and profits, and anything received in excess of the rate of interest sanctioned by the law was applied to the reduction of the principal. (*Samar Ali v. Karimullah*, I. L. R., VIII All., 402.) Mortgagees, therefore, hit upon the expedient of entering upon possession, not as mortgagees, but as lessees at a fixed rent. The lease was sometimes taken in the name of a third person, but the object in either case was the same, to evade the liability which the Regulations imposed upon the mortgagee in possession. Such a transparent device could not, however, be sanctioned by our Courts of Justice, and *zuripeshgee* leases were regarded only as mortgages, and the mortgagee was not permitted to use them as a shield against the claim of the mortgagor for an account. The rule was not relaxed even when the rent reserved by the lease was shown to be a fair rent. In the case of *Hanuman Persad Pandey*, in which the mortgagee insisted

The usury
laws.

(*h*) As to laws regarding usury at one time in force in the different Presidencies, see Macpherson on Mortgage, p. 149, note.

LECTURE VII. that he was in possession only as lessee, and was not liable to account for the gross proceeds, the rent reserved on the lease not being shown to be unfair, and it not being suggested that there was any attempt to evade the usury laws, Lord Justice Knight Bruce, in giving the judgment of the Privy Council, observed :—" One point remains to be considered, namely, whether, in taking the account between these parties, the defendant is to be charged as mortgagee in possession with the actual rents and profits, or only with the rent fixed by the pottah. It is said for the appellant that the Sudder Dewany Adawlut did not set aside the pottah. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage-bond ; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation, such as this pottah evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage-security and forfeiting the claim of the mortgagee to the principal and interest ; but Mr. Palmer contends that where there is no such evasion, and a *bond fide* and fair rent is fixed upon as representing *communibus annis*, the rents and profits of the estate, the Court ought to stand on that agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that by reason of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis ; but notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewany Adawlut, directing an account of the actual rents and profits, therefore proceeds on the right principle, and it is in accordance with the true nature of the security and the spirit of the Regulations.

" In the case of *Roy Juswant Lall v. Sree Kishen Lall* (XIV S. D. A., 1852, p. 577), the Court seems to have thought that, where a mortgage lease was granted, and whilst the

Hanuman
Persad
Pandey's
case.

term was running, the mortgage account could not be taken; but it appears from that case that, in former decisions of the Court, not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipts of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of the mortgage-security, whatever be its form or duration, can be viewed only as a security for a mortgage-debt, and must be restored when the debt, interest, and costs are satisfied by the receipts."

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It followed, therefore, that not only could the mortgage be redeemed before the end of the term, but that the rent reserved on the lease could not be taken as settling beforehand the annual amount with which the mortgagee was to be chargeable in account. The arrangement might be in every respect a fair one, but our Courts, in their anxiety to protect the debtor from usurious contracts, refused to give effect to such an agreement. A zuripeshgee lease, in fact, is nothing but a mortgage, and though a lease like this in form may be for so many years, it may at any time be cancelled on the advance being proved to have been discharged with interest from the usufruct, or on the money being paid in cash. (*Pultun v. Reshal*, I Suth. W. R., 7; *Nundlall v. Baluk*, II Agra H. C. Rep., 122.)

Right of
redemption.

The position, however, of the usufructuary mortgagee has been greatly modified by the repeal of the usury laws, and I shall, therefore, ask you carefully to contrast the rights and liabilities of the usufructuary mortgagee as they stood before the repeal of the usury laws, and as they stand at the present day.

Position
and liability
of usufructuary
mortgagee
before
repeal of
usury laws.

I have already stated that down to the year 1855, a usufructuary mortgage, whatever might be the terms of the contract between the parties, came to an end by virtue of the enactment contained in Section 9 of Regulation XV of 1793, as soon as the principal, together with interest at twelve per cent., if no lower rate should have been agreed upon between the parties, was realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagor. The mortgagor, therefore, might redeem the property at any time, and the Court was bound to allow him to do so without any regard to the period mentioned in the mortgage. There might, perhaps, be good reasons for

LECTURE VII. enacting that the mortgage should be cancelled as soon as the money was realized from the usufruct, but it is difficult to see why the mortgagee should be compelled to be paid off by the mortgagor before the appointed time. There is, perhaps, no system of law which guards the rights of the mortgagor with greater jealousy than the English, and yet the Court of Chancery, in the absence of any fraud or improper dealing, will not set aside an agreement, postponing the equity of redemption to a long deferred day, and in one case, the Court refused to relieve the mortgagor, even though he offered to pay the whole of the interest receivable by the mortgagee in advance. [*Brown v. Cole*, XIV L. J. N. S. Ch., 167. See also *Burrowes v. Molloy*, II Jo. and Lat., 521 (i).]

Right of redemption of mortgagor.

The mortgagor, therefore, under the Regulations, had the right to redeem at any time on payment of the money due, either on account of principal, or interest, or both, and it was no answer to such a suit that the term for which the mortgage had been granted had not expired, or that the money had not been realized from the usufruct.

Position of zuripeshgeedar.

The position of the zuripeshgeedar, perhaps, deserves a closer examination. I have already called your attention to the light in which zuripeshgee leases were always regarded by our Courts. They were not regarded as mere leases, and could not therefore be set up as a defence in an action by the mortgagor for possession instituted before the expiration of the term. It is true that the decisions of the Sudder Dewany Adawlut of Calcutta at one time showed a considerable fluctuation of opinion, but all the more recent authorities are in favor of the view that a zuripeshgee, before the repeal of the usury laws, might be redeemed, even before the expiration of the term. (*Pungun Singh v. Amina Khatun*, VI Suth. W. R., 6; S. D. A., 1860, p. 174; S. D. A., 1852, pp. 280, 304.)

Usufructuary mortgages after repeal of usury laws.

I will now discuss the nature of usufructuary mortgages created after the repeal of the usury laws. The utmost latitude is now given to the parties to contract in any manner they choose, and the restrictions, which the Regulations imposed on the creditor, have been wholly withdrawn. While the usury laws were in force, the mortgagee was bound to account for the gross profits, allowance

(i) There may, however, be a proviso enabling the mortgagor to redeem on a certain day or on payment before or after it. (*Hardinge v. Tinge*, XXXIV L. J. Ch., 13.)

being only made for necessary outlay and expenses of collection, and the mortgagor could not deprive himself of this right even by contract. Since the repeal, however, of those laws, the mortgagor and mortgagee may make any contract they please, and the mortgagor may by contract deprive himself of the right to call for an account of the rents actually received by the mortgagee out of the estate. In the case of *Munnoo Lall v. Reet Bhoobun Singh* (VI Suth. W. R., 284), the Court observed :—"With regard to the first part of the contention that a mortgagee in possession is bound in every case to account for the profits, and that a mortgagor cannot by contract deprive himself of his right, it is no doubt true that, while the usury laws were in force, a restriction in this respect did certainly exist. But this prohibition on the free power of the parties to contract as they please was solely a consequence of the usury laws then in force; and on the abolition of those laws, the restriction in question fell with them. By Section 4 of Act XXVIII of 1855, it is expressly enacted that an agreement that the use of usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties. We are of opinion that a mortgagor and mortgagee are now at liberty to make what contract they please with reference to the profits of the mortgaged estate." This case is, therefore, an authority that the mortgagor is at liberty to contract in any manner he pleases, and will not be relieved from any covenant binding him not to ask for an account of the actual profits. A zuripeshgeedar, therefore, is, as the law now stands, bound to account, not for the profits actually received by him out of the estate, but only for the rent reserved on the lease.

The question has arisen whether a zuripeshgee, created since the repeal of the usury laws, may be redeemed before the expiration of the term specified in the deed; and the reported cases on the point show the inclination of our Courts to treat zuripeshgees as ordinary leases, which cannot be put an end to before the expiration of the term for which they have been created (j). Zuripeshgee leases,

Right of
redemption.

(j) Of course where no term is fixed, a usufructuary mortgage may be redeemed at any time, and the mortgagee will be entitled to re-enter on the property, if on taking an account it appears that the principal and interest have been satisfied. (*Doul Narayan v. Runjit Singh*, I Cal. L. Rep., 256.) It is necessary to observe that the transaction in this case bore date the 18th of July 1845, but it seems to have been decided on the assumption that it was unaffected by the usury laws. See also *Venneri v. Patanattil*, II Mad. H. C. Rep., 332.

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however, are seldom intended to create a distinct estate, but are only effected as security for the mortgage-money. In this view, it would perhaps be difficult to treat them as ordinary leases. Be that, however, as it may, there is little doubt that a zuripeshgee, created since the repeal of the usury laws, cannot be redeemed before the term for which it has been executed has expired (*k*). (*Khajeh Lootf Ali v. Goozraz Thakoor*, XI Suth. W. R., 408 ; *Soorjun Chowdry v. Imam Bandee Begum*, XII Suth. W. R., 527 ; *Sreemunt Dutt v. Krishna Nath Dutt*, XXV Suth. W. R., 10 ; *Joomna Pershad v. Joyaram*, II Cal. L. Rep., 26 ; *Khojah Lutif Ali v. Goojraj*, XII Suth. W. R., 528, note ; *Chunder Coomar v. Iswur Chunder*, XIV Suth. W. R., 455.) It is perfectly valid as an agreement settling beforehand the annual amounts with which the mortgagee would be chargeable in account, and as the equity of redemption may be postponed to any day that the parties may agree upon, I do not think that the Court will permit the mortgagor to pay off the mortgage-money and re-enter upon the estate before the expiration of the term for which the zuripeshgee has been created, that being the period fixed for the redemption of the mortgage. It may, no doubt, be suggested that, in the absence of any express stipulation, postponing the right of redemption, the mortgagor ought to be permitted to redeem ; but, except in very badly-drawn instruments, there is sufficient indication of the intention of the parties, that the money shall be repaid on the determination of the term for which the zuripeshgee is effected, and as in the case of an ordinary creditor, the mortgagee has the right to refuse payment at an earlier date. It may, perhaps, strike some of you, that it is of no consequence whether you treat the zuripeshgee as a lease on a reserved rent, or as an agreement settling the basis on which the account between the parties are to be taken. This, however, is by no means so, and the distinction is an important one, as I shall endeavour to show in the next lecture. In either view, however, a zuripeshgee is valid since the repeal of

(*k*) The question, however, whether the transaction is a mere lease or a mortgage may be of considerable importance in cases in which limitation is set up as a defence, or in which a transaction is sought to be set aside on the ground of its improperly fettering the equity of redemption. (*Gopal v. Desai*, I L. R., VI Bom., 674 ; *Abdul v. Kashi*, I L. R., XI Bom., 462.) The question may also arise in connection with the provisions of particular statutes, the Registration or Stamp Act, for instance. (*Ram v. Thacoor*, I L. R., IV Calc., 6 ; *Ex-parte Hill*, I L. R., VIII Calc., 254.)

Regulation XV of 1793, as an engagement excluding an account of the actual profits realized by the mortgagee in possession. But it requires a clear expression of intention to deprive the mortgagor of his right to redeem. If, therefore, a usufructuary mortgage is made for a definite term, but no further term is created, the mortgage may be redeemed at the end of the term. (*Kanara v. Ryrappar*, I. L. R., III Mad., 213, N. W. P., 1853; p. 356.)

It is necessary to observe that, in the absence of any contract to that effect, a usufructuary mortgagee has no right either to foreclose or to sell the property comprised in the mortgage. (*Mohesh Sing v. Chanhorju Singh*, I. L. R., IV All., 245; *Sheo Narayan v. Jai Gobind*, I. L. R., IV All., 281; *Gangaprasad v. Kusagari*, I. L. R., I All., 611; *Dulli v. Bahadur*, VII All. H. C. Rep., 55.) In a late case the Court observed :— “ Although it is true that these leases are treated by the Courts as usufructuary mortgages, and that parties to them have, to some extent, the rights of mortgagor and mortgagee, it does not follow that in a case of this kind the lessee is entitled to have the property sold. To do that would be to give him a greater security than he has stipulated for. All that has been held by the Courts in regard to transactions of this kind, as I understand it, is, that the parties ought to be considered, not simply as lessor and lessee, but as mortgagor and mortgagee, the lease being granted as a security for repayment of the money. This would put the lessor in the position of a mortgagor and give him the rights of a mortgagor, and, to the extent of the security given, would put the lessee in the position of mortgagee with the rights and liabilities attached to that character. What is now asked for is beyond that. We think that the decision of the lower Appellate Court is right, and that the plaintiff is not entitled to the decree which he sought in this suit.” (*Kewal Sahu v. Rashnargain Sing*, XIII Suth. W. R., 446.) A zuripeshgeedar, to whom the property itself is not pledged, has, therefore, a very imperfect security. (Cf. *Nundolal v. Kullipa*, Marshall, 209; *Muyeedannissa v. Dildar Hossein*, XX Suth. W. R., 178; for cases in which it was held that the property itself was mortgaged as security for the debt, see *Phul Kuar v. Musli Dhur*, I. L. R., II All., 527; *Munnoolal v. Reetbhoobun*, VI Suth. W. R., 283, distinguishing *Dulli v. Bahadur*, VII All. H. C. Rep., 55.)

Foreclosure and sale.

It is, perhaps, scarcely necessary to remind you that a

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 usufructuary mortgagee in possession may not, any more than a mortgagee in any of the other forms, deny the title of the mortgagor to mortgage or to redeem. (*Santaji v. Bayaji*, Bom. P. J., 1876, p. 70; *Chinto v. Lakshman*, P. J., 1876, p. 28.) As in other kinds of mortgage, one of several mortgagors in a usufructuary mortgage is entitled to redeem the whole mortgage, but the rule does not, it seems, apply where possession is sought to be recovered on the ground that the debt has been satisfied out of the usufruct. In such cases the plaintiff can only claim his own share, and the extent of it should be determined in the presence of all the co-mortgagors. (*Fakir Bukush v. Sadat Ali*, I. L. R., VII All., 376; but see *Mirza Ali Reza v. Tarasoodari*, II Suth. W. R., 150.) The mortgagor who redeems the whole estate will be entitled to possession and receipt of the whole of the rents, subject to account with his co-mortgagors. (*Gobind Pershad v. Dwarkanath*, XXV Suth. W. R., 259.)

Redemption when there are several mortgagors.

Redemption.

A usufructuary mortgage may be redeemed within the same period as any other mortgage. Before the passing of Act XIV of 1859, however, a usufructuary mortgage might be redeemed at any time; but, as the law stands at present, the mortgagor must exercise the right of redemption within sixty years from the time when the right to redeem or to recover possession accrues to the mortgagor. The period, however, as I have already had occasion to observe, may be enlarged by a written acknowledgment by the mortgagee (1). It must be borne in mind that the general article relating to suits for immoveable property has no application to an action by a mortgagor who has executed a usufructuary mortgage for a term of years, seeking to recover possession of the mortgaged property, alleging that the mortgage-debt has been paid off. The possession by a mortgagee for a term of years after the expiration of the term is not necessarily adverse to the mortgagor, and so long as the relation of mortgagor and mortgagee exists, the mortgagor has sixty years within which to redeem. (*Chuda v. Mahant*, Bom. P. J., 1883, p. 145. Distinguish *Gopal v. Desai*, I. L. R., VI Bom., 674.)

There are some other points connected with usufructuary mortgages, which, however, will be more conveniently discussed in the next lecture when I come to treat of accounting.

(1) See further on the subject of limitation generally, App. Statutes, tit. Limitation.

LECTURE VIII.

Liability of mortgagee in possession to account—Regulation XV of 1793—Meaning of “gross receipts”—Mortgagee not competent to create middlemen—Allowance for expenses of collection—Practice of our Courts—Nature of accounts which mortgagee is bound to produce—Verification of accounts—Right of mortgagee to interest not exceeding 12 per cent.—*Shah Makhun Loll v. Sreekissen Sing*—Liability of mortgagee since Act XXVIII of 1855—Zuripeshgee leases—Allowance for necessary repairs—Improvements how far allowed—Payment of Government revenue—Mode of taking accounts—Liability of mortgagee after notice of subsequent incumbrance—Mortgagor not liable to account—Mortgagee not a trustee for mortgagor—Wassilat distinct from usufruct—Mortgagee chargeable with occupation rent—Suit for redemption—Practice of the Courts in Bengal—Procedure in such cases elsewhere.

I STATED in the last lecture that the position of the mortgagee in possession has been considerably modified by the passing of Act XXVIII of 1855. It will, therefore, be convenient to deal, in the first place, with mortgages governed by Bengal Regulation XV of 1793 (*a*), and then to deal with those which are governed by Act XXVIII of 1855.

In mortgages created before the repeal of the usury laws, the mortgagee, if in possession, is bound to account for the gross proceeds, allowance, however, being made for the “costs of collection and preservation of the estate in mortgage,” and any contract excluding an account of the actual rents and profits, is, as I said in the last lecture, as a rule, wholly inoperative. (*Hyder Buksh v. Hossein Buksh*, IV Suth. W. R., 103; *Fuzlool Ruhman v. Ali-kureem*, V Suth. W. R., 163; *Punjum Singh v. Ameena Khatoon*, VI Suth. W. R., 6; *Doorga Debee v. Issur Chunder*, X Suth. W. R., 367. Distinguish *Mahadu v. Bhagiratti*, Bom. P. J., 1877, p. 169, where the Court held that no condition for an account could be engrafted on the

Mortgagee in possession.

Liability of mortgagee in possession to account.

(*a*) As to laws regarding usury, at one time in force in the different presidencies, see Macpherson, p. 149, note. I may mention that the rule of *dumdupat* is still applied in the Presidency of Bombay, but not where, in taking the accounts against the mortgagee in possession, credit is given to the mortgagor for the rents and profits as against the principal and interest due to the mortgagee. (*Nuthubhai Parrachand v. Mulchand Hirachand*, V Bom. H. C. Rep., 196; *Sheobart v. Dharee*, II Agra H. C. Rep., Part II, 194; *Narayan v. Satvaji*, IX Bom. H. C. Rep., 83; *Hari v. Balambhat*, I. L. R., IX Bom., 233.)

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of 1793.Makhan-
lal's case.

contract.) And the mere fact that the purchaser of the equity of redemption retained a certain sum for payment to the mortgagee as due on the mortgage, would not preclude the former from claiming an account. (*Jafree v. Gunga*, III Agra H. C. Rep., 91; *Bibee Suzyedun v. Zuhoor*, Suth. W. R., 1864, p. 44.) But there may be cases in which the mortgagee may relieve himself from the obligation; for instance, when the only sum he is to receive beyond the interest allowed by law is an unvarying and not a fluctuating amount which the Court, under the circumstances, regards as a fair allowance for the costs of collection. (*Badri Frosad v. Murali Dhur*, I. L. R., II All., 593.) But an agreement to exclude accounting absolutely would not, as I have already said, be sustained under the usury laws, nor would a mere recital of such an agreement, in the absence of a new contract in a document executed after the repeal of those laws, affect the right of the mortgagor to call for an account. [*Mahtabkuar v. The Collector of Shahabad*, I. L. R., V All., 419 (b).] The duty of the mortgagee is defined in Section 11 of Bengal Regulation XV of 1793, which says:—“For the adjustment of the accounts, in the cases of mortgages specified in Section 10, where the mortgagee shall have had the usufruct of the mortgaged property, the mortgagee is to be required to deliver in the accounts of his gross receipts from the property mortgaged, and also of his expenditure for the management or preservation of it. The mortgagee is to swear, or (if he be of the description of persons whom the Courts are empowered to exempt from taking oaths) to subscribe a solemn declaration, that the accounts which he may deliver in are true and authentic.”

Now, although the section speaks of the gross receipts, they must be such as the mortgagor himself could have realized before the mortgage, and if he could not by reason of an intervening lease call for the account of the collections, neither can the mortgagee. The terms of the law are not inflexible, and must receive a construction such as may suffice to accommodate its provisions to the variable and different natures of estates and possession. (*Shah Makhun Loll v. Sreekissen Sing*, XII Moore Ind. App., 157; XI Suth. W. R., P. C., 19.) The mortgagee, however,

(b) The mode of accounting, except where it is only a device to exclude accounting altogether, may, of course, be regulated by the terms of the deed. (*Ram Pershad v. Kishen*, III Agra H. C. Rep., 146; *Radhabenode v. Kripamoyee*, XIV Moore Ind. App., 443, Cf. 451; S. D. A., 1848, p. 549; N. W. P., 1855, p. 22.)

must not create a middleman between himself and the tenants; and if he does so, he is not relieved from the responsibility of accounting for the gross rents payable by the tenants. (S. D. A., 1852, p. 1137; S. D. A., 1857, p. 1513.) Again, a mortgagee in possession cannot grant a title to any one for a period in excess of the duration of his own interest in the estate, and it would seem that, unless the tenant of the mortgagee attorns to the mortgagor, the latter will not be entitled on redemption to sue the former for rent. (*Adjoodhya Sing v. Girdharee*, II All. H. C. Rep., 199.) In England large leasing powers have been given both to the mortgagor and mortgagee by the Conveyancing Act of 1881, but in this country it seems that the mortgagee in possession, and the same remark applies to the mortgagor, is only entitled to create a tenancy from year to year, or in the case of house property, from month to month, in the ordinary course of management. Formerly in England a mortgagee could not make a valid lease without the concurrence of the mortgagor except in a case of necessity. (*Hungerford v. Clay*, 9 Mad. 1; *Corbett v. Plowden*, 25 Ch. Div., 678.) Nor was the mortgagor in possession clothed with any implied authority to let the premises, even from year to year, at a rack rent. (*Keech v. Hall*, and the notes to it, I Smith L. C., 574.) The rule, however, would seem to be a somewhat inconvenient one, but as pointed out by Lord Mansfield, it is not likely to work any practical mischief, for where the lease is not a beneficial lease, it would be undoubtedly for the interest of the mortgagee to continue the tenant. Where the lease happens to be a beneficial one, the tenant may always put himself in the place of the mortgagor by redeeming the mortgage.

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The mortgagee, however, is not an assurer of the continuation of the same rate of profit as the mortgagor was able to raise, although he may be liable for the non-receipt of profits which he might have received with common care and attention. (XII Moore Ind. App., 192-193.)

Gross
receipts
what.

In England a mortgagee accounts for rent according to the rate at which the premises were let when he took possession, unless the contrary is shown by him. (*Blacklock v. Barnes*, Sel. Ca. Ch., 53.) This rule, however, must be applied with great caution in this country, where so much depends on personal qualities, and where a change of management and possession may cause a falling off of

LECTURE receipts; an estimate of a preceding rental, is not, therefore, always a proper measure of actual receipts. (XII Moore Ind. App., 193.)(c)

Mortgagee bound to what extent,

The mortgagee is, strictly speaking, liable only for the amount actually realized by him, except in cases of fraud or wilful neglect of which *prima facie* evidence must be given by the mortgagor. The general rule on the subject is that the mortgagee in possession is only accountable for what he has received, and is not bound to take any particular trouble to make the most of another's property. *Choti v. Kalka*, VII All. H. C. Rep., 100. (d)

But, on the other hand, he is bound, as pledgee of the estate, to take the same care of it as every prudent owner is in the habit of taking of his own property, and he is responsible for waste, for the consequence of wilful default, and for all loss resulting from negligence amounting to a breach of trust; but the mortgagor cannot lie by

(c) I am, however, bound to add that a more stringent rule seems to have been acted upon in some of the earlier cases in the reports, and in taking the accounts, the mortgagee has been held answerable for the rents exhibited in the rent roll of the state in the absence of any satisfactory explanation as to the reasons for the non-realization of any portion of the rents. In the case of *Chobey Harbons v. Pitom Singh*, the Court observed: "The principal Sudder Ameen has correctly made the jumabundee, or gross rental, the basis of the account. It is the business of the mortgagee to realize the rents, and he is allowed 10 per cent. on the collections, in addition to the legal rate of interest on his debt on account of the trouble and responsibility involved in this duty. It is only on a special plea that the balance accrued from circumstances beyond his control, that he can be allowed to deduct outstanding arrears, ordinary balances must be held to be covered by the allowance of 10 per cent. given for the trouble of collecting. No circumstances have been alleged by the appellant in this case which can entitle him to have the asserted balance of rent thrown out of the account." N. W. P. 1854, p. 371, cf. *Chokey Lall v. Kalia Dass*, N. W. P. 1854, p. 159; *Rajah Heera Singh v. Sahoo Luchmon Dass*, S. D. A., N. W. P. 1853, p. 564; *Meer Boonead Ally v. Deendyal*, S. D. A., N. W. P. 1854, p. 201; *Syed Wazeer Alee v. Jugmohon Singh*, S. D. A., N. W. P. 1854, p. 465; *Khyaleeram v. Ram Dyal*, S. D. A., N. W. P. 1855, p. 51; *Abbas v. Sahib Alee*, S. D. A., N. W. P. 1855, p. 355; *Runjeet Singh v. Musst. Dhookhin Acharaj Koonwar*, S. D. A. 1858, p. 1847; *Jhujjo Sahoo v. Hurrack Chand Sahoo*, S. D. A. 1860, vol. I, p. 639; see also *Mirza Ali Reza v. Tara Soonderee*, 2 W. R., 150. It seems to me, however, that instead of allowing the mortgagee in account a fixed percentage on the collections on account of his trouble and responsibility, that, while on the one hand, he ought to be allowed only his reasonable expenses, he should not, on the other hand, be regarded as an insurer of the rents and profits of the mortgaged premises for the benefit of the mortgagor. For the English law on the subject, see Fisher's Mortgage, 859-860.

(d) As regards the duty of a mortgagee of a fractional share of an estate held in joint tenancy, see *Mirza Ali Reza v. Tara Soondori*, II Suth. W. R., 150.

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without giving notice, and afterwards charge the mortgagee with the effect of his own negligence. (II Wh. & Tud. L. C., 771, and the cases there cited.) The civil law is the same, requiring of the creditor "exact diligence" in the custody of the thing pledged; and to be as careful in that custody as the average of careful men usually are in their own affairs: Inst. lib. III, tit. xiv, 4, Dig. lib. XIII, tit. vii, 14. And so by the Hindoo Law, as expounded by Sir T. Strange (Chap. XII), the creditor in possession of the property pledged "will be bound to indemnify his debtor, for any damage it may sustain in his hands through want of due care" (Note by Editor to *Girjoji v. Keshav*, II Bom. H. C. Rep., p. 213; N. W. P. 1852, 436; N. W. P. 1854, p. 1) (e). Such being the nature of the obligation of the mortgagee, it follows that if the security is of a wasting nature, and is suffered to deteriorate, the mortgagee will be precluded from following other assets (Coote, 1113).

Similarly the mortgagee of an agricultural holding will be liable if he is guilty of gross mismanagement in the cultivation of the land, and a mortgagee in possession of cultivable land must cultivate the ordinary crop which it is capable of yielding. (*Girjoji v. Keshaorav*, II Bom. H. C. Rep., 211, the head-note of which is incorrect; *Wragg v. Denham*, II Y. & C., Exe., 117.)

It seems somewhat doubtful upon the authorities (I Agra H. C. Rep., 281; Cf N. W. P. 1864, p. 305) whether a usufructuary mortgagee can plant trees without the consent of the mortgagor, but if he does, he will be liable to account for the profits arising from the trees planted by himself on the mortgaged land, and he may either be charged with a fair occupation rent or with the actual net profits realized by him after deducting all outgoings, and allowing a reasonable rate of interest on the capital employed in the undertaking. (*Prabhakar v. Pandurang*, XII Bom. H. C. Rep., 88.)

You will observe that the mortgagee is entitled to the expenses of collection, and a fixed percentage on the gross collections is generally allowed to him under that head varying from five to ten per cent. In one case, however, the Court observed: "No item should be allowed to the mortgagee, which is not either admitted by the mortgagor, or supported by evidence of some sort. For instance, neither ten

(e) Cf. *Noyes v. Pollock*, 30 Ch. D., 336, where it was held that the accounts of the mortgagee are not sufficient if they only show sums received in lump from the mortgagee's agent.

LECTURE VIII. per cent. nor five per cent. should be allowed for collection charges, but only so much as the expenses of collection actually amounted to, and if proper vouchers for this are not forthcoming, at least some evidence should be adduced sufficient to lead to a reasonable estimate of what the expenses under this head probably were." (*Mukund Loll Sukul v. Goluk Chunder Dutt*, IX Suth. W. R., 575; cf. *Brojonauth v. Bhugobutty*, I Suth. W. R., 133; *Roghonath v. Luchmi*, I Agra H. C. Rep., 132.)

Accounts
to be full
and com-
plete.

I need hardly observe that the accounts which the mortgagee is bound to deliver must be full and complete. They must exhibit detailed items of all actual receipts and disbursements, and must be accompanied by all vouchers. In one case in which the mortgagee put in certain jumma-wasil-bakee papers, the Court observed:—"Jumma-wasil-bakee papers, although they may, and perhaps may very strongly and directly, support a mortgagee's account put in under the law (section 3, Regulation I of 1798), are not and cannot be that account itself. That account which the mortgagee by law has to put into Court, is not that of his agent or tehsildar, given by the latter for his master's (the mortgagee's) information as to such agent's collections. The jumma-wasil-bakee paper, however, is this latter only. The account to be put in under the law is one to be made, verified, and proved by the mortgagee himself in the way before indicated. His jumma-wasil-bakee papers, duly attested by those who prepared them, or who collected according to them, and supported by the receipts of the talookdars or ryots, who also may be called to depose to those receipts and to what was the real demand, collection, and balance of each of their respective tenures may well be adduced to support the mortgagee's own account when made and put into Court under the law cited.

Mohun
Loll's case.

"In fact, the account required from the mortgagee is one setting forth what he has realized, from what portions of the mortgaged property, in what terms or periods, with what loss and gain on the several assets, with what necessary reductions, and what remains then as the net profits which can be taken as actual realizations towards liquidating the sum due under the mortgaged transactions." (*Mohun Loll Sukul v. Goluk Chunder Dutt*, V Suth. W. R., 276; cf. *Bibee Suyeedun v. Zuhoor*, Suth. W. R., 1864, 44; *Ramkissen v. Shah Kundun*, Suth. W. R., 1864, 177; *Ameer-*

Goddeen v. Ramchand, V Suth. W. R., 53; *Ramlochan v. Kunkhyalal*, VI Suth. W. R., 84; *Tasaduk v. Beni*, XIII Cal. L. R., 128; N. W. P., 1850, p. 244.) LECTURE
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It used to be thought at one time that the accounts must, in every case, be verified by the mortgagee himself, and that the terms of the law were inflexible. The Privy Council, however, observed in a late case:—"Their Lordships think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting in case of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general manager who did all, and knows all, with whom the mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are; and who far more than mere representative knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law swears to the truth of them, it is such a reasonable compliance with the spirit of the law at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever for suspecting malpractice or designed evasion of the law; and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case than as it raises a case of suspicion against the accounts themselves." (*Shah Makhum Loll v. Sreekishen Singh*, XII Moore Ind. App., 157; XI Suth. W. R., P. C., 25.) Verifi-
cation of
accounts.

The necessity for an account, however, does not arise in every case. In the case of a usufructuary conditional sale, for instance, the mortgagee is bound to account only when the mortgagor has deposited the principal, leaving the question of interest to be afterwards settled, or has deposited all that he alleges to be due, or asserts that the whole of the debt has been liquidated by the usufruct. (*Forbes v. Ameerunissa*, X Moore Ind. App., 340.) The onus is on the mortgagor to show that the debt has been discharged out of the usufruct. (*Mukhum Loll v. Sreekishen*, XII Moore Ind. App., 157; *Bama Soonduree v. Bama Soonduree*, X Suth. W. R., 301; cf. *Kullyan Das v. Sheonundun*, XVIII Suth. W. R., 65, where the onus is said to be on the mortgagor to show that the principal sum has been satisfied, and on the mortgagee to show what, if anything, Accounts
where
necessary.

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is due to him for interest.) (f) If the mortgagee refuse or neglect to deliver in the accounts, the Court must take the best evidence available and decide upon it. The general presumption will, no doubt, be against the mortgagee, but this would not justify the Court in accepting without examination any evidence which may be offered by the mortgagor. Presumptions in *odium spoliatoris* have known limits, although it may fairly be doubted if those limits have not been overstepped in some of the cases in the books. (*Shah Makhum Loll v. Sreekishen Singh*, XII Moore Ind. App., 157; XI Suth. W. R., P. C., 25; *Shah Gholam Nazaf v. Mussamat Emamun*, IX Suth. W. R., 275; *Mohanlal v. Goluck Chunder*, X Moore Ind. App., 1; *Hashum v. Ramdhone*, VII Suth. W. R., 82; *Tikaram v. Kamiram*, Bom. P. J. 1876, 191.)

Rate of
interest.

I have already said that in a mortgage, created before the repeal of the usury laws, the mortgagee cannot take any higher interest than twelve per cent. on his money. He may, no doubt, agree to take less, and such agreement will be binding upon him. But he cannot in any case exceed the limit fixed by the Regulation. Cases, however, may occur in which the interest reserved by the mortgage will not be the true measure of the annual stipulated return for the loan. A very interesting question on this point arose in the case of *Shah Makhum Loll v. Sreekishen Singh*. The interest reserved by the instrument of mortgage was nine per cent., but the mortgagor, as part of the transaction, executed a lease in favour of the mortgagee, which would leave to the mortgagee an annual profit of something more than three per cent. on the principal money. The mortgagee thus secured to himself a return of something more than twelve per cent. on his money. The mortgagor brought a suit, not for avoiding the transaction altogether as a

(f) Ordinarily where there is no question of the satisfaction or discharge of the mortgage-debt, on taking the account on a mortgage, it lies upon the mortgagee to prove what is due from the mortgagor in respect of principal and interest. In a mortgage suit, where the defendant admitted that he was in possession of the property in dispute as a mortgagee under the plaintiff, but refused to put in evidence the mortgage-deed, which was insufficiently stamped, it was held that the plaintiff was entitled to redeem on paying what was due from him on the mortgage, together with the costs of the suit, and that, if the mortgagee refused to pay the penalty and put the mortgage-deed in evidence, he could only be credited in the account with the sum which the plaintiff admitted to be the amount of the principal, and must be debited with the income derived from the land, since he, the mortgagee had been in possession. (*Ganga v. Bayajee*, I. L. R., VI Bom., 669.)

device to evade the laws against usury, but for redemption, and contended that, under the Regulation, the mortgagee, while he could not demand more than the rate of interest specified in the deed of mortgage, was bound to account for the actual collections, and that such account could not be excluded by the lease which was only part of the mortgage security. The Privy Council, while holding that the mortgagor had a right to insist on the mortgagee's accounting for the actual collections, were of opinion that the latter was entitled to have the bargain performed, so far as the law allowed, and that the rate of interest reserved by the mortgage was only a part of the annual stipulated return for the loan which would not have been granted at nine per cent. only, the rate mentioned in the deed of mortgage. In giving judgment, their Lordships observed:—"It is clear that if the mortgagees had been suing the mortgagor on the mortgage-deed for the debt, they could have recovered no higher rate of interest than nine per cent., the contract being in writing and incapable of being varied by parol evidence; but this is by no means decisive of the question, for, supposing that the extra profits on the several engagement forming one mortgage security had amounted only in the whole to three per cent., making a twelve per cent. only in all, precisely the same consequence would have ensued; the reserved interest would have been correctly viewed as constituting part only of the profit, and as such, would have been all that the parties stipulated for as to that part of the transaction; but it would not have measured the stipulated return for the loan annually. The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protections; one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies that a man cannot both affirm and disaffirm the same transaction to show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approve and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals as one applicable also in the Courts of

Makham
Loll's case.

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Maxim.

that country which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes v. Amerunissa Begum* (X Moore Ind. App., 356) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships:—‘The respondent cannot both repudiate the obligations of the lease and claim the benefit of it.’ Unless, therefore, some positive law has said that, in cases similar to the present, the written engagement, though not extending to the whole profit stipulated, must be adhered to against the defendant, though the plaintiff may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold that the bargain disclosed should be performed so far as the law allows; in other words, that twelve per cent. was in this instance the interest to be computed.” (*Shah Makhum Loll v. Sreekishen Singh*, XII Moore Ind. App., 157; XI Suth. W. R., P. C., 21; *Tasieduk v. Beni*, XIII Cal. L. Rep., 128; *Perladh v. Broughton*, XXIV Suth. W. R., 275.) The judgment of their Lordships, however, does not touch the general rule on the subject, which is, that in usufructuary mortgages, where there is no stipulation for interest, the mortgagee is not entitled to any, but must be satisfied with the usufruct which goes in lieu of interest, although such usufruct may not amount to twelve per cent. on the principal money. (*Ganga Persad Roy v. Bibee Enayit Zaheria*, XVI Suth. W. R., 251, distinguishing *Shah Makhum Loll v. Sreekishen Singh*, XII Moore Ind. App., 157. Cf. *Kullyan Das v. Sheonundun*, XVIII Suth. W. R., 65; *Ram v. Admed*, Bom. P. J., 1882, 385.)

Effect of
an agree-
ment not
to account.

We saw in the last lecture that, since the repeal of the laws against usury, a mortgagee may always relieve himself from the liability of accounting for the actual profits by an agreement with the debtor. The prohibition on the free power of the parties to contract in any manner they please has been withdrawn. The profits may be either taken in lieu of interest (Act XXVIII of 1855, section 5), or the parties may agree upon a certain sum beforehand, as the basis on which the account between them is to be taken, and this brings me back to the question of zuripeshgee leases. You will remember that our Courts refused to acknowledge zuripeshgees as leases on a reserved rent,

because they might be made the means of obtaining usurious interest. That argument cannot any longer hold good, now that the laws against usury have been repealed, and a mortgagee, entering into possession as a *zuripeshgeedar*, will probably be now regarded, not as mortgagee in possession but as lessee at a fixed rent. (See Lecture VII.) The relation, however, is so peculiar that we must be cautious in extending to it all the incidents of an ordinary tenancy. The English Court of Chancery, I must tell you, looks upon such transactions with the greatest jealousy, a jealousy which has not been relaxed by the repeal of the usury laws. "One effect," says Vice-Chancellor Stuart, "of the repeal of the usury laws was to bring into operation to a greater extent than formerly another branch of the jurisdiction of the English Equity Courts, namely, the principle which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity, from prevailing against him." "In order," adds the learned Judge, "to render a contract or an agreement of any kind binding, there must be the assent of both parties to the agreement, under such circumstances as to show there was no pressure, no influence existing of a kind to make the assent an imperfect assent, or an assent which, under other circumstances, would have been refused. If the assent to the agreement is not an assent given under such circumstances as that both parties are on an equal footing, and the agreement, one perfectly free from any influence or pleasure in the eye of this Court, it is not an assent sufficient to constitute an agreement." (*Barret v. Hartly*, 2 L. R., Eq., 795.)

It may, however, be suggested that such a doctrine, unless fenced in by limitations, which would narrow its application only to every exceptional cases, would be likely to introduce the very same evils which the Legislature intended to remove when it applied the sweeping brush to the usury laws in our statute book. Indeed, the doctrine itself in its relation to debtors and creditors is a "survival." It is another illustration of the "half-conscious repulsions," which we feel to doctrines which we cannot deny. In speaking of them, Sir Henry Maine says:—"It seems to me that the half-conscious repulsions which men feel to doctrines which they do not deny, might often be examined with more profit than is usually supposed. They will sometimes be found to be the reflection of an older order of ideas. Much of moral opinion is no doubt in advance of

Origin of
the doc-
trine.

LECTURE VIII. law, for it is the fruit of religious or philosophical theories having a different origin from law and not yet incorporated with it. But a good deal of it seems to me to preserve rules of conduct which, though expelled from law, linger in sentiment or practice. The repeal of the usury laws has made it lawful to take any rate of interest, yet the taking of usurious interest is not thought to be respectable, and our Courts of Equity have evidently great difficulty in bringing themselves to a complete recognition of the new principle." (Maine's *Village Communities*, p. 195.)

Moral
sentiments.

I have dwelt at some length on the point, as there are indications at the present moment of a desire on the part of our Courts to introduce into this country some of the doctrines of the English Court of Chancery, which rest, not upon the basis of economical science but upon certain vague moral sentiments, which lie outside the pale of positive law. See for instance *Vinayak v. Raghi* (IV Bom. H. C., Rep., 202, A. C. J.)

Extent of
liability
to account.

We saw that since the repeal of the usury laws, a mortgagee may not only receive the rents and profits in lieu of interest, but he may also protect himself from accounting for the actual receipts by an agreement with the mortgagor. In the absence, however, of any such agreement, the mortgagee is still bound to account for every farthing received by him out of the estate, and he will not only have to account for the rents actually realized, but also for such as he might have received but for his wilful default(g).

Allowance
for neces-
sary re-
pairs.

A mortgagee, however, is entitled in account to any outlay made by him in the preservation of the property, as for necessary repairs, and interest is generally allowed on the amount of the outlay at the rate reserved by the mortgage. In the case of *Jogendranath Mullick v. Rajnarain Paloooye* (IX W. R., 488). Mr. Justice Kemp observed:—"Under the law as administered in this country, a mortgagee in possession is in the position of a trustee. The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor, and must not do anything to diminish the security upon which the money was lent. In this case, the mortgaged property was a thatched

(g) Where the rights of the parties are defined by a decree of Court, they must be determined, not with reference to the general law, but with reference to the terms of the decree. (*Nachi v. Raghu*, I. L. R., VIII Bom., 303, where the mortgagee in possession under a decree was held not liable to account to the mortgagor for the rents and profits.)

house. To allow it to fall out of repair and to become uninhabitable, would have been diminishing the value of the security on which the money was advanced, and preventing the mortgagor from paying off the debt from the usufruct. It is the bounden duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed to charge for the same with interest." (*Ameeroola v. Ramdass*, II Agra H. C. Rep., 187; *Manchursa v. Kamrunisa*, V Bom. H. C. Rep., 109, A. C. J.; *Ragho v. Anaji*, V Bom. H. C. Rep., 116, A. C. J.; *Jamal v. Muhammed*, Bom. P. J. 1874, 7; *Balaji v. Nana*, Bom. P. J. 1881, 195, a case of repairing wells).

You will observe that, in the judgment of the Court in *Jogendranath Mullick v. Rajnarain Paloooye*, it is said that it is the duty of the mortgagee to keep the mortgaged premises in repair. This is, no doubt, true in a certain sense, but the proposition requires one qualification. A mortgagee is not bound to make any outlay even in necessary repairs, except where there is a surplus left after the deduction of the interest from the rents. A different rule might be ruinous to the mortgagee.

Repairs
how far
compul-
sory.

A mortgagor is not only bound to pay as the price of redemption the cost of proper and necessary repairs, but also any expenses incurred by the mortgagee in restoring the mortgaged premises where they have been accidentally destroyed, and the mere fact that the expenses greatly exceed the amount of the principal money secured by the mortgage would not, it seems, constitute over improvement. (*Manchursha Ashypanoiiori v. Kumrunisa Begum*, V Bom. H. C. Rep., 109.) A mortgagee has also been allowed in this country for the expenses incurred in connection with the Revenue Survey of the land mortgaged to him. (*Bapusabin Sadasiv v. Ramjibun Gopalji*, II Bom. H. C. Rep., 220 (h)). If, how-

Repairs
how far al-
lowed.

(h) It is necessary to state that the Bombay High Court has refused to apply the strict rule of the English Courts of Equity as against a mortgagee in possession under a mortgage made before the decision of the Court in *Ramji v. Chintoo*, and who had been led into the belief that by reason of the non-payment of the money at the time fixed in the mortgage-deed his right had become absolute. (*Anandray and Devaray v. Rajji*, II Bom. H. C. Rep., 214; *Smith v. Simpson*, VII Moore, 205; *Ramji v. Chintoo*, I Bom. H. C., 199; *Ramshet v. Paudhay*, VIII Bom. H. C. Rep., 236, A. C. J.) If the mortgagee is not called upon to account, no allowance will be made for cost of repairs, such cost being necessary to the enjoyment of the profits. (*Lakshman v. Hari*, I. L. R., IV Bom., 584.) But he may be entitled to be repaid sums expended in constructing a new work, an embankment, for instance, for the protection of the mortgaged property. (*Fakir v. Umabai*, Bom. P. J., 1884, 9.)

LECTURE VIII. ever, there is an express agreement between the parties on the point, it is not competent to the court to go outside the instrument. (*Narayan v. Rangu Bai*, I. L. R., V Bom., 127.)

Summary. To sum up what I have said; the right of the mortgagee to be reimbursed for necessary repairs is not co-extensive with his liability to answer for non-repair by which the mortgaged premises may be diminished in value or wholly destroyed. The mortgagee in possession is not bound to rebuild a ruinous house, for instance, or increase his debt by laying out anything beyond the rent. The property may deteriorate by lapse of time, or even owing to want of repair, but the mortgagee will not be held answerable in the absence of gross or wilful negligence. The extent to which the mortgagee may safely go in repairing the mortgaged estate, is thus laid down by Fisher in his work on Mortgages, and the rule has been followed in this country as founded in equity and good conscience. "The mortgagee will be allowed for proper and necessary repairs to the estate, and if buildings are incomplete or become ruinous so as to be unfit for use, he may complete or pull them down, and rebuild for the preservation of his security. And the rebuilding or repairing may be done in an improved manner and more substantially than before, so that the work be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used, for the property when restored ought to be of the same nature as when the mortgagee received it; and if it be thus wholly, or in part, converted from its original purposes, the money expended will not be allowed to be charged upon it." (Fisher on Mortgage, p. 887.) A mortgagee will be allowed all his fair expenses in renewing leases, protecting the title to the mortgaged property, paying head rent, as well as the costs of necessary repairs. I may mention that interest is generally allowed on such outlay, but not apparently on sums expended for repairs, although the reason for this distinction is not quite obvious. (Seton on Decrees, 4th Edition, 1067.)

Improvement how far allowed.

The question of improvements presents much greater difficulty. It would, however, seem that as a rule, allowance will not be made to the mortgagee for improvements, even of a lasting kind, unless they are made with the sanction of the mortgagor, or are absolutely necessary for

the preservation of the estate. The mortgagor must not be improved out of the estate. (*Sandon v. Hooper*, 12 L. J. Ch., 309.) (i.) It may not, perhaps, be here out of place to mention that in no case will a second mortgagee be entitled to charge for improvements as against the first. (*Land-owners West of England and South Wales Land Drainage and Enclosure Company v. Ashford*, 16 Ch. D., 411) Fry, J., in that case said that no authority had been shown to him for such a proposition, and that he was not going to make such an inconvenient precedent for the first time. A mortgagee in this country will be allowed in account all payments made on account of

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(i) I ought to mention that in a recent case in England (*Sandon v. Hooper* has been commented upon, and a view more favourable to the mortgage than that stated in the text has been taken by the Court. (*Shepard v. Jones*, 21 Ch. D., 469) ; the head note, which is not very full, is to the following effect :—

“If a mortgagee in possession, or a mortgagee selling under his power of sale, has reasonably expended money, in permanent works on the property, he is entitled, on *prima facie* evidence to that effect, to an inquiry whether the outlay has increased the value of the property, and it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure.

Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of shewing that he acquiesced in it.”

This judgment, however, I need scarcely point out, is not absolutely binding on our Courts any more than the decision in *Sandon v. Hooper*. I am also bound to mention that, although the observations of Jessel, M. R., are somewhat general, the judgment of Cotton, L. J., is more guarded and is confined to the case of a mortgagor seeking to obtain the surplus proceeds of a sale by the mortgagee without allowing for the improvements made by the mortgagee, and without which the property would not have fetched the price which it did. The judgment, moreover, was given on an appeal from an order of Kay, J., refusing to direct an inquiry, and did not, therefore, finally dispose of the question. (*Tipton v. Tipton*, 7 Ch. D., 192.) As to the Roman Law on the subject, Dr. Hunter says :—A question arises whether expenses not necessary, but beneficial to the property, ought to be allowed. Paul speaks generally of improvements (Paul. Sent. 2, 13, 7,) which would include beneficial expenditure (utiles empenoæ.) Ulpian speaks with more hesitation (D. 13, 7, 25.) He recommends a middle course to the judge : on the one hand, not to be too burdensome on the debtor ; and on the other, not to be too fastidious in disallowing beneficial expenditure by the creditor. He puts two cases illustrating of his meaning. A creditor teaches slaves a handicraft or skilled work. If this was done with the consent of the debtor, of course, the expenditure must be allowed ; also, if the creditor only followed up what had already been begun. Necessary instructions must also be allowed, but further than that Ulpian was not inclined to go. The other case is somewhat different. A large forestor pasture is hypothecated by a man who is scarce able to pay the creditor ; this creditor cultivates it, and makes it worth a great deal of money. Ulpian thought it was too hard that the debtor should thereby be improved out of his property. (Hunter's Roman Law, p. 440).

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paramount charges on the mortgaged estate, as also for what he has expended in preserving the property from deterioration. Again, if a mortgagee is put to expense in defending the title to the mortgaged estates, the defence being for the benefit of all parties interested in it, he is entitled to charge such expenses against the estate (*Damodar v. Vamanrav*, I. L. R., IX Bom., 435; *Sandon v. Hooper*, 6 Beav., 248; *Parker v. Watkins*, Johns, 133). (As to what a mortgagee is entitled to claim in England, under the head of just allowances, see White and Tudor, L. C., Vol. 2, pp. 1237-1242). It is somewhat remarkable that till the passing of Lord Cranworth's Act in England, the mortgagee was not entitled to add to his mortgage-debt any premiums paid by him for insurance, without the consent of the mortgagor. But premiums paid by the creditor on a life-policy pledged to him were always recoverable on the ground that such payments were made for the purpose of protecting the mortgaged property from forfeiture. 34, L. J. Ch., 251.

Payment
of Govern-
ment re-
venue.

In the absence of any express contract to the contrary, it is the duty of the mortgagee in possession to pay the Government revenue, and if the mortgagee wilfully default to pay the revenue and purchase the property himself, the Court will fasten a trust upon the purchase in favour of the mortgagor. The mortgagee, who properly or improperly allows an estate to fall into arrear, cannot purchase it so as to acquire an irredeemable interest. (*Nawab Sidhi Nazir Ally Khan v. Adjuharam Khan*, X Moore Ind. App., 540; V Suth. W.R., P.C., 83; see also *Raja Adjudyaram Khan v. Ashootosh Dey*, Supreme Court, 6th July 1855, and *Kelsall v. Freeman*, *Englishman*, 4th September 1854; *Juggut Mohini v. Sokheemoney*, XIV Moore Ind. App., 289; *Rammanick v. Brindabun*, V Suth. W. R., 230.) Any payment, however, made by the mortgagee, either to prevent a forfeiture, or a sale for non-payment of revenue or rent, will be credited to him in account. In *Nurjoon Sahoo v. Shah Moorzeerooddeen* (III Suth. W. R., 26), which was a suit to redeem a usufructuary mortgage on payment of the principal only, there being no stipulation for interest, the mortgagee in his defence insisted upon his right to retain possession so long as the sums which he had been obliged to pay as revenue, the estate having been assessed with revenue subsequently to the mortgage, were not repaid by the mortgagor or realized from the

rents and profits, the Court observed :—" Ordinarily the law gives to a person interested in land a lien against the defaulting owner for sums of money paid by the former in discharge of the public revenue. The payments made by the defendant appear to us to entitle him to a lien within this principle. His equitable claim to such protection is certainly not diminished in this case by the fact that the plaintiff has pledged to him, as lakheraj land, which was not valid lakheraj, and has now been actually assessed with revenue ; nor can the plaintiff contend that the annual receipts from the land, which, when it passed into the defendant's hands, were clearly to be appropriated solely to the defendant's use (subject to the mortgagor's right to an account), became subsequently bound for the mortgagor's benefit, although in violation of his express agreement to discharge his estate from the lien of the person who actually paid the revenue. This right is, we think, sufficient to qualify the otherwise undoubted right of the mortgagor to redeem his land on payment of the principal alone. If we gave effect to the latter right in the present suit, we should, in the probable event of the mortgagor requiring no accounts of the mortgagee's receipts while in possession, leave only to the mortgagee a doubtful remedy by suit for the money which he has paid, a great portion of which would be met by setting up the law of limitation as a defence." (Of *Achumbit v. Keso*, XX Suth. W. R., 128, which was a case of dispossession from a part of the mortgage premises).

Similarly it has been held that, in the case of a usufructuary mortgage where the rents and profits were to go in lieu of interest, an action may be brought by the mortgagee for any enhanced revenue which may have been paid by him ; and it has been said that it is not necessary for the mortgagee to wait till the end of the term, nor is it necessary for the Court to take any account (*Nikka Mal v. Suliman Sheik*, I. L. R., II All., 193).

I shall now discuss the mode of taking accounts against the mortgagee in possession. The gross collections are ascertained at the end of each year, and, after deducting the necessary outlay on account of revenue, expenses of collection, and preservation of the estate, the balance goes to reduce either in whole or in part the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each

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Moorzee-
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of enhanced
revenue.Mode of
taking ac-
counts.

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year. (Cf. *Rudah Benode v. Kripa Maye*, XIV Moore Ind. App., 443) in which another mode is pointed out, but the result is the same. (*Raghunath v. Lachman*, I Agra H. C. Rep., 132; *Enaet Ali v. Khur Roy*, II Sutth. W. R., 289; *Chutoorbhooj v. Doorga Churn*, V Sutth. W. R., 200; S. D. A. 1853, p. 464; S. D. A. 1848, p. 549; S. D. A. 1852, p. 831; S. D. A. 1859, p. 497; S. D. A. 1859, 1211; S. D. A. 1859, p. 1543.) In England it is not, of course, to direct annual rests against the mortgagee in possession, but a different rule obtains in this country. It is, however, doubtful whether the right of the mortgagee not to be paid piecemeal has been sufficiently considered by our courts. If, however, the mortgage-debt is paid off by means of the rents and profits during the possession of the mortgagee, he will ordinarily be liable to pay interest on all subsequent receipts. (*Jai Jit Rai* by his guardian *Porhati Kuor v. Gobind Tewari*, I. L. R., VI All., 303; *Bechoo v. Shebsahoy*, I All. H. C. Rep., 111.) (*j*.)

Right of
purchaser
of equity
of redemption.

It is necessary to observe that the only payments which a purchaser of the equity of redemption can claim to deduct from the mortgage-debt are sums actually received in reduction of the mortgage-debt, and that the fact that the mortgagee (*k*) owed money on some other account to the

(*j*) In England the usual practice is to set the total amount of rents and profits which are chargeable to the mortgagee against the whole amount due on his security, first in discharge of the interest, then of moneys, if any, advanced for the preservation of the mortgaged property, and lastly, in reduction of the principal. But the excess of rent over interest is not annually applied in reducing the principal, as the mortgagee may reasonably object to be paid piecemeal. If, however, there is no interest in arrear when the mortgagee enters, the annual surplus is generally applied in reduction of the principal money, and this is called taking the accounts with rests. If the mortgagee, however, consists of lease-hold property, and there are grounds for apprehending that the rent and insurances will not be duly paid or the houses will not be kept in proper repair, annual rests will not be directed, even though no interest may be in arrear when the mortgagee enters in possession. As a rule, however, the mortgagee does not make himself liable to this mode of account if he takes possession when the arrear of interest is due until the whole debt is discharged. The above rule, however, does not apply where any part of the mortgaged property is sold in which case the surplus, after payment of costs and interest, is applied to the reduction of the principal and the accounts are continued on the footing of the principal thus reduced. Fisher, 872—876.

(*k*) There seems to be some conflict of opinion as to whether interest should run from the date of the overpayment, or only from the date of the institution of the suit for redemption. (*Janofi v. Janofi*, I. L. R., VII Bom., 185; *Bechoo v. Sheosahay*, I All. H. C. Rep., 111). It may be here noticed that a mortgagee (and the same remark would apply to a mortgagor), seeking to redeem, who has obtained a decree for an ac-

mortgagor, would not of itself entitle the purchaser of the mortgagor's equity of redemption to set off that money against the mortgage-debt (*Tarinee v. Ganoda*, XXIV Suth. W. R., 460). It seems, however, that a purchaser of the equity of redemption will be entitled, on taking the mortgage accounts, to credit for malikana reserved to the mortgagor by the mortgage-deed but withheld by the mortgagee (*Basant Rai v. Kanauji Lal*, I. L. R., II All., 455). It may be here stated that if the mortgagee comes to an agreement with some of the mortgagors, by which he consents to take a money decree against them, the amount of the decree must be considered as a sum actually paid in reduction of the liability under the mortgage. (*Ramkanth v. Kalimohan*, XX Suth. W. R., 310.)

I ought to mention that in India, as in England, a mortgagee may transfer his right to a third person by way of assignment, but such transfer must be without prejudice to the rights of the mortgagor; and in a suit by a mortgagor the assignee will be bound by the state of the account between the mortgagor and mortgagee (*Chinnayya v. Chidam*, I. L. R., II Mad., 212 (l)). The question of the liability of the mortgagee in possession after assignment, when it is not made with the assent of the mortgagor, for the rents and profits received by the assignee, does not seem to have been ever raised in this country. In England, the mortgagee continues to be liable on the principle that the mortgagee must be responsible for the person to whom he assigns the mortgagor's estate (m). It may, however, be doubted whether the doctrine will be recognized in our Courts.

The jealousy with which the Court of Chancery guards the interest of the mortgagor, is well illustrated by the rule invariably acted upon, that no personal allowance is

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Liability
of mortgagee in possession after assignment.

No allowance to the mortgagee.

count and sale, is not entitled to withdraw from the taking of accounts when those accounts appear to be going against him. (*Doolee Chand v. Omda*, I. L. R., VI Cal., 377.)

(l) *Quære*, whether the account arrived at in a decree obtained by the prior mortgagee against the mortgagor only is binding on a puisne mortgagee, who had no notice of the subsequent incumbrance (*Sankona v. Biru*, I. L. R., VII Bom., 146.) In one case in the Calcutta High Court an account was directed to be taken in a suit by a second mortgagee against his mortgagor and a third mortgagee, not only of what was due to the plaintiff but also of what was due to the third mortgagee. (*Auhindro v. Chunnoolol*, I. L. R., V. Cal., 101.)

(m) It has been recently held that no such liability is incurred by the mortgagee if the transfer is made under an order of Court. (*Hall v. Heward*, L. R., 32 Ch. D., 430.)

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Right and
liability of
mortgagee
when mort-
gagor in
possession.

to be made to the mortgagee himself, although the salary of an agent may be allowed when the collections cannot conveniently be made otherwise. Any agreement to make an allowance to the mortgagee is absolutely void, and the repeal of the usury laws has made no change in this respect in the practice of the English Court of Chancery.

I shall now treat of the rights and liabilities of the mortgagee when he allows the profits to be received by the mortgagor instead of entering upon possession himself. The rule of English law on the subject is thus stated by Fisher as the result of the authorities: "After receiving notice of a puisne mortgage, the mortgagee in possession becomes liable to account to the puisne incumbrancer for so much of the surplus rent as he has paid to the mortgagor or his representatives; but so long as the mortgagee in possession is without notice, the puisne mortgagee cannot call upon him or the mortgagor for an account of the bygone rents" (Fisher on Mortgage, p. 875.) This rule was applied to an Indian mortgage in this country by the Privy Council in *Jugjeewan Dass v. Ram Dass*. In that case, the mortgage-deed, after stating that the village of Mujeegum and the house at Sural should be mortgaged for a certain sum, went on to say:—"The profit of this money is settled for twelve annas, on these conditions, that the holders of the mortgage are to receive in redemption the whole of the produce of the said village, about 3,000 or 3,200 rupees, and after allowing for interest, the remainder will go for the purpose of liquidating the principal, and they shall continue so to receive and appropriate the annual produce until the whole of their demand be liquidated. The risk of collecting the income, and of any deficiency in the revenue, is upon our heads, that is the mortgagor's; and we do further declare that the holders of the said mortgage shall station a mehta or clerk of their own in the said village, for the purpose of making the collections; and we, the mortgagors, so long as this property remains in mortgage, do agree to give him a monthly salary of five rupees and his daily food so long as we can afford to do so." It seems that the mortgagee continued in possession under this deed for a short time, but afterwards allowed the mortgagors to receive the rents and profits. In execution of a decree obtained by the plaintiff against the mortgagors, the property was placed under attachment when the mortgagee for the first

Jugjeewan
v.
Ram Dass.

time had notice of the plaintiff's claim. In determining the respective rights of the parties, the Privy Council said:—"Now the question will be, in what way the mortgagee's rights are affected by this conduct; and that will depend, first, upon the construction of the instrument itself. If this is a binding contract,—binding between him and the mortgagors,—binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage. The only effect would be, when some subsequent incumbrancer came in, and he had notice of that claim. In that case, the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer; and that is the principle which their Lordships think ought to be applied to the present case." (*Jugjeewan Dass v. Ram Dass Brijbhukun*, II Moore Ind. App., 487; VI Suth. W. R., 11 P. C.) By the decree which was ultimately made, the mortgagees were postponed to the attaching creditor in respect of the rents which might have been received by them, but for their allowing the mortgagors to continue in possession. The rights of the mortgagees against the mortgagors personally were left untouched, and they were only permitted to continue in possession till the balance settled on the above principle was realized. *A fortiori* if the mortgagee makes any payments to the mortgagor after he has notice that the equity of redemption has been purchased by a third person, he will not be allowed such payments in account (*Jai Jit Rai* by his guardian *Porbah Kuor v. Gobind Tewari*, I. L. R., VI All., 303.) Similarly, if the first mortgagee, with notice of a subsequent incumbrance, joins with the

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VIII.Mortgagor
in possession
not bound to
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not a trustee
for
mortgagor.

mortgagor in a sale of the mortgaged premises, and permits the latter to receive the purchase-money, he will be postponed to the second mortgagee in respect of the amount received by the mortgagor. (*Bentham v. Haincourt*, Pre. Ch. 30 ; Cf. *West L. C. Bank v. Reliance*, P. B. S., 27 Ch. D., 187. S. C. in appeal, 29 Ch. D., C. A., 954.)

While on the subject of accounting, I may mention that the mortgagor in possession is not bound to account, although the security may be insufficient. This is the rule of English law, and is also the law in this country. A mortgagor, however, may be liable to an action for mesne profits, if he withhold possession from the mortgagee in violation of the terms of his contract, or after notice by the mortgagee. It is scarcely necessary to repeat that the mortgagor will also be liable for mesne profits from the date of the final foreclosure (*i.e.*, from the expiration of the year of grace). There are expressions in some of the reported decisions of the Sudder Dewany Adawlut, which might, at first sight, seem to countenance the notion that it was only from the date of the decree for foreclosure that the mortgagor would be liable for mesne profits. I have, however, already pointed out to you that the rights of the parties, after a decree for foreclosure, are precisely those which they possessed at the date of the expiration of the year of grace. The decree only declares those rights, and it must therefore follow, that, if there is any liability in the mortgagor for mesne profits, that liability must exist before the decree for foreclosure, and consequently at the expiration of the year of grace, which may be called the dividing point of time.

The question has arisen as to the precise position of a mortgagee after the mortgage-debt has been liquidated by the usufruct. It seems to have been held in some cases that his position was that of a trustee, and that therefore no limitation was applicable to a suit brought by the mortgagee for surplus profits. These decisions were, however, overruled by a Full Bench of the Calcutta High Court, and the period of limitation was held to be six years (*Baboo Lall Doss v. Jamal Ali*, IX Suth. W. R., 187.) This was under the old law. Under the present Act, a suit for surplus profits must be brought within three years of the date on which the mortgagor re-enters on the mortgaged property (*n*). The interpretation clause also tells

(*n*) It may be noticed that an action for redemption ought to include a claim for over-payments. (*Baloji v. Taman*, VI Bom. H. C. Rep., 97,

us that a mortgagee is not a trustee within the meaning of the Act. (*Willoughby v. Willoughby*, 1 Term Rep., 765; *Casburne v. Inglis*, 2 Jac. and Walk., 194, 196, in note; see also *Warner v. Sach*, 20 Ch. D., 220, in which case *Downes v. Grasebrook*, 3 Mer., 200, and *Robertson v. Norris*, 1 Giff., 421, were observed on.)

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A question of some nicety arose a few years ago in the High Court of Calcutta as regards the liability of a mortgagee to account for mesne profits, which was ultimately heard by a Full Bench. In that case, which was a suit for redemption, the principal having been deposited, the mortgagee was called upon to account for moneys which he had realised by means of a decree for mesne profits against the mortgagor, who had evicted him from the mortgaged premises. The question arose under Regulation XV of 1793, and it was contended for the mortgagor that the mortgagee was bound to account to him for the moneys which he had succeeded in realizing from the mortgagor in excess of the legal interest of twelve per cent. per annum. It was, however, held by the Full Bench that the mortgagee was not liable to account for the mesne profits. In giving judgment, Peacock, C. J., said:—"There is a wide distinction between usufruct collected by a mortgagee in possession and damages which are awarded to a mortgagee in a suit brought by him against the mortgagor for evicting him. We think that the defendants were not bound under the words or the spirit of Regulation XV of 1793, or Regulation I of 1798, to account for the wasilat or damages which they have received under the decree in the suit brought by them against the mortgagor for possession. If a mortgagor wrongfully turns a mortgagee out of possession, it is his own fault, and the mortgagee is entitled to retain any wasilat which he may recover against the mortgagor, and is not bound to account for it. To prevent an evasion of the usury laws, the Regulation compelled the mortgagee to account for the usufruct; if that exceeded interest at twelve per cent., the balance was to be accounted for. We think that a Regulation of this kind must be construed strictly, and that we ought not so to construe it as to

Joymungul
Sing's case.

Wasilat
distinct
from usu-
fruct.

A. C. J. Distinguish *Gour v. Sahay*, VII Suth. W. R., 364; cf. Fisher's Mortgage, p. 857, note. *Quare*, as to the effect of Art. 105 of Act XV of 1877.) The general practice seems to be to allow interest on the over-payments from the date of the institution of the suit for redemption by the mortgagor. (*Janoji v. Janoji*, I. L. R., VII Bom., 185; S. D. A. 1853, p. 464; N. W. P. 1855, p. 257.)

LECTURE substitute wasilat recovered by a decree of Court for usufruct enjoyed by a mortgagee. The case of *Chutterdharee Kowar v. Ramdoolun Kowar* (Sudder Decisions of 1859, p. 1181), is a case very much in point, though the question arose in a different form." (*Joymungul Sing v. Sardeen*, VI Suth. W. R., 240.)

Nilkant
Sen's case.

In the case of *Nilkant Sen*, the facts of which were somewhat peculiar, the mortgagee had wrongfully dispossessed the mortgagor, the mortgage being one by conditional sale, and not giving the mortgagee power to receive the rents and profits. The mortgagor brought a suit for possession and mesne profits. He got a decree for possession, but the prayer for mesne profits was rejected, apparently because there was some technical informality in the prayer in the plaint. The mortgagee subsequently proceeded to foreclose, and when he brought a regular suit for possession as absolute owner, the Court held that he was bound to account for the profits during the time he was in possession, just in the same manner as if he had been let into possession by the mortgagor. It would seem, although the fact is not clear from the report, that a suit for mesne profits would have been barred (*Nilkant Sen v. Joynedin*, VII Suth. W. R., 30; cf. *Jaigut v. Govind*, I. L. R., VI All., 303.)

Mortgagee
chargeable
with occu-
pation rent.

A mortgagee in possession, who instead of letting the land to tenants and realizing the rent in the ordinary way, cultivates it himself, is not liable to account for the whole of the profits arising to him from farming the land, but only for such profits as he would have received, if he had let the land to a tenant, and so in the case of any other profits, the mortgagee, if in possession, is chargeable only with an occupation rent. (*Rughunath Roy v. Gridhari Sing*, VII Suth. W. R., 244.)

Mortgagee
not a ten-
ant.

The position of the mortgagee is not, however, that of a tenant. He is in as mortgagee. Thus, for instance, where the mortgagee of a house was let into possession under an agreement, that he should pay a certain rent annually, part of which was to be set off against the interest, and the residue payable to the mortgagor, and the house was destroyed by fire, the Court was of opinion that the mortgagor was not entitled to recover any rent, although the decision would not improbably have been the other way, if the relation between the parties had been only that of landlord and tenant. The gist of the agreement was, as the Court pointed out, not

a letting of the premises with a rent reserved, but a usufructuary mortgage with a certain small portion of the usufruct payable to the mortgagor (*Venkatashwara v. Kesava Shetti*, I. L. R., II Mad., 187.) It is necessary to observe that an attornment clause in a mortgage-deed, such as is frequently found in an English mortgage, will not render the mortgagee liable to account on the footing of mortgagee in possession in respect of the rent reserved by the attornment clause (o). A mortgagee is not obliged to avail himself of this clause, and there is no ground for saying that, because the mortgage-deed contains such a clause under which, however, no possession is taken, the mortgagee is fixed with all the liabilities of mortgagee in possession (*Stanley v. Grundy*, L. R., 22 Ch. D., 478.) But if the mortgagee gives notice to the tenants not to pay their rents to the mortgagor, he becomes entitled to take possession, and though he may not afterwards actually take possession, he will be answerable to the mortgagor for any loss sustained by him. It is the duty of the mortgagor either to take possession himself or to leave the mortgagor alone (*Heabes v. MacMurray*, 23 Beav., 401). Again, the fact that the mortgagee is in receipt of the rents and profits of the mortgaged estate, does not necessarily make him chargeable as mortgagee in possession. The question, whether he is a mortgagee in possession, depends upon whether he has taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants. Thus, for instance, where B was the agent of the mortgagor, and received the rents of the estate, applying them in payment of the interest to the mortgagee, and the mortgagee wrote to B, enclosing notices to the tenants to pay the rents to him which B was to serve on them if the mortgagor should attempt to interfere, and B replied, promising to pay the rents to the mortgagee, and not to the mortgagor, and the notices were not served on the tenants, but B paid the rents, as he received them, to the mortgagee, it was held that the mortgagee could not be charged as mortgagee in possession (*Noyes v. Pollock*, 32 Ch. D., 53.) Appointing a clerk for the purpose of collecting the rents may amount to taking possession (*Jugjeewan v. Ram Dass*, II Moore. Ind. App., 487). It is, perhaps, scarcely necessary to point out that a mortgagee in possession of only a part of the mortgaged estate, who allows the mort-

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Effect of
attornment
clause in
mortgage-
deed.

(o) As to the distinction between an ordinary tenancy and an attornment clause in a mortgage-deed, see *In re Isherwood*, 22 Ch. D., 384.

LECTURE VIII. **gagor to retain possession of the rest, will not be charged constructively as if he had been in possession of the whole. (Soor v. Dalby, 15 Beav., 156.)**

Mortgagee in possession liable for damage.

I ought to mention that, although it is not correct to speak of a mortgagee in possession as a trustee for the mortgagor, he will be liable to account for any damage done to the property, as by pulling down buildings improperly (*Sandon v. Hooper*, 6 Beav., 246, 14 L. J. Ch., 120). Similarly the mortgagee will be liable if he allows any minerals to be taken away by third persons from the mortgaged lands (*Hood v. Easton*, 2 Giff., 692), and in one case a mortgagee in possession of lease-holds was charged for permitting the forfeiture of a lease by reason of a breach of a covenant to complete buildings on the demised land. (*Perry v. Walker*, 1 Jur. N. S., 746.)

Suits for redemption.

In concluding this lecture, I wish to say a few words on the manner in which suits for redemption are treated by the Courts in Bengal and the North-Western Provinces. The practice has been to treat a suit for redemption as a suit for ejectment, and to refuse any relief to the plaintiff, except upon proof that every condition necessary to the right to immediate possession, has been fulfilled. You will find it laid down in several cases, that, in a suit for redemption, the mortgagor must fail, if anything is due to the mortgagee on the security, and the plaintiff cannot show that he had deposited or tendered the amount (*p*). In some instances, however, conditional decrees have been made, and in recent cases the Court has shown some disinclination to adhere to the old practice; a practice which, I venture to think, is attended with inconvenience as well to the mortgagor as to the mortgagee. It is true that plaints are not very artificially framed in the Mofussil Courts, and suits are very frequently brought for recovery of possession on the allegation that the mortgage-debt has been satisfied. Such suits, however, are substantially brought for the purpose of ascertaining as between the parties what is the state of the account, a right which is expressly given by Statute to the mortgagor. We saw that, according to the

Practice in Bengal.

(*p*) Ordinarily, a suit for an account upon a mortgage cannot be maintained by a mortgagor, unless he also prays for redemption. (*Hurry v. Lakshman*, I. L. R., V Bom., 614; *Shamkarapa v. Danapa*, I. L. R., V Bom., 604.) Where, however, the objection was not taken in the Court below, the mortgagor has been allowed, even in second appeal, to convert the suit into one for redemption. (*Hari v. Sitaram*, Bom. P. J., 1882, 159; *Jivaji v. Kaka*, Bom. P. J. 1883, 9.)

practice of the English Court of Chancery which is followed in the other provinces, the Court, in a suit for redemption, invariably takes an account of the monies due to the mortgagee on his security, and if anything is due to the mortgagee, the mortgagor is directed to pay it by a time appointed by the Court, and on his failure to do so, the suit for redemption is dismissed; such dismissal having generally the same effect, and carrying with it the same consequences, as a decree for foreclosure. It would be difficult to suggest any reason why the same practice should not be followed in Bengal. According to the present practice of our Courts, the Court is bound to take an account in a suit for redemption, but, even if a single rupee be found due to the mortgagee, the suit is dismissed; and, however carefully the account may have been taken, the finding of the Court would seem not to be binding upon either party in any subsequent suit. This naturally leads to a perfect waste of litigation which might be easily prevented by the exercise of the power, which our Courts undoubtedly possess, of moulding their decrees in such a way as to meet the exigencies of each case. (See the observations of Phear, J., in *Mukund Loll Sukul v. Goluk Chunder Dutt*, IX Suth. W. R., 572. Compare IV N. W. P., 37; V N. W. P., 104; VI N. W. P., 221; X N. W. P., 543; S. D. A., 1849, p. 392). The following recent cases may be usefully consulted by the student:—*Shah Lutafut Hossein v. Chowdry Mahomed Moneim*, XXII Suth. W. R., 269; *Rajah Saheb Perladh v. Broughton*, XXIV Suth. W. R., 275. See also *Kullyan v. Sheonundun*, XVIII W. R., 65; *Dinkur Doyal v. Sheogolam*, XXII W. R., 172. Compare *Brijoolall v. Mutty*, Suth. F. B., 33. In a recent case a conditional decree for redemption was made by the Allahabad High Court in a usufructuary mortgage. (*Sahibzada v. Pormeshor Dass*, I. L. R., I All., 524.) See also *Raja Radha Kant Rai v. Bhagwun Das*, I. L. R., I All., 344; *Bhairab Mondal*, XVII W. R., 408.

LECTURE IX.

Liens—Legal and Judicial—Distinction between—Statutory liens—Regulation VIII of 1819 and Act VIII of 1869 (B.C.)—Act XI of 1859—Salvor's lien—Lien of co-sharer for revenue paid by him—Unpaid vendor's lien—*Mackreth v. Symmons*—What constitutes waiver of lien—Objections to legal liens—Registration—Purchasers without notice—Practice of English Court of Chancery—Purchaser's lien—Lien of partners and agents—Tenants in common—No lien for dower in Mahomedan law—None in favour of creditors on assets of deceased debtor in Hindu or Mahomedan law—Judicial lien—Attachment before and after judgment—Operation of Section 240 of Act VIII of 1859—Alienation by debtor not absolutely void—*Anund Mohun Dass v. Radha Mohun Shah*—Striking off attachment—Effect of—*Puddomoney v. Roy Mothuranath Chowdhry*.

Liens
legal and
judicial.

IN the present lecture I propose to treat of liens or securities created by the operation of law. In the introductory lecture I pointed out to you the difference between these charges and charges created by the express or implied consent of the parties. I also stated that liens may be divided into two groups, legal and judicial; the one constituting a part of substantive law, and the other, a part of the law of procedure. I propose to discuss the law relating to legal liens in the first place, and then to treat of judicial liens (a).

(a) The liens here discussed are known as non-possessory in the English law, and are divided by English lawyers into equitable and judicial. Liens of this class are actively enforceable, and do not confer a mere passive right of retainer. I may here mention that the application of the word 'lien' from a French word signifying 'tie' is of comparatively modern date in the English law. "The right of retainer which was allowed by the English law, at least as early as the reign of Edward IV, is not mentioned by this name in the early reports; and the word 'lien' appears not to have found its way into the Law Dictionaries so late as 1671 and 1672. Editions of *Termes de la Ley* and of *Cowell's Interpreter*, printed in those years do not contain it. The want of precision in its use is remarkable. A common law lien depends upon retainer; and as there can be no retainer without possession, the word itself is often said to imply possession, although it originally had no such force and even at law it is used to denote the right of a judgment-creditor. But in equity it is used not only in the common law sense, and also as descriptive of an equitable right not depending upon possession (such as the vendor's lien for the purchase-money of land), but is also often applied to equitable mortgages and

I have already said that there are some cases in which a lien is expressly conferred by statute, while there are others in which the right has been recognised by our Courts of Justice as resting on those principles of equity which the Indian Courts are bound to administer. But though they are the growth of 'judicial legislation,' I need hardly point out, they do not differ in any essential feature from the class which may be called statutory liens. The earliest instance of the latter is furnished by the enactment contained in the 13th section of Regulation VIII of 1819. That section says :—"If the person or persons making such a deposit in order to stay the sale of the superior tenure, shall have already paid the whole of the rent due from himself or themselves, so that the amount lodged is an advance from private funds, and not a disbursement on account of the said rent, such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage (b); and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced, from any profits belonging thereto. If the defaulter shall desire to recover his tenure from the hands of the person or persons, who, by making the advance, may have acquired such an interest therein and entered in possession in consequence, he shall not be entitled to do so except upon repayment of the entire sum advanced, with interest, at the rate of twelve per cent. per annum, up to the date of possession having been given as above, or upon exhibiting proof in a regular suit to be instituted for the purpose, that the full amount so advanced, with interest, has been realized from the usufruct of the tenure."

securities of a like nature which rest simply upon contracts. Although contracts are sometimes expressed to be made for mercantile liens, no actual liens are so conferred. The express stipulation and agreement for a security excludes the lien and limits the rights by the extent of the express contract. *Expressum facit cessare tacitum*. Per Sir W. Grant, 2 Mer. 404; per Lord Westbury, L. R., 1 P. C., 305." Fisher's Mortgage, p. 107, note (a).

(b) Compare section 17, clause 5, of the same Regulation, and see *Surnomoye Dassya v. The Land Mortgage Bank*, I. L. R., VII Cal., 173, on the question of priority.

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—
Statutory
liens.

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IX.Provisions
of the
Tenancy
Act.

This, I need hardly point out, is a very beneficent provision, and was extended by section 62 of Act VIII of 1869 (B.C.), to the case of a tenure about to be sold under that Act, and the payment of the rent by any one interested in the protection of the under-tenure; and now by the Bengal Tenancy Act a similar privilege is given to any person having, in a tenure or holding advertised for sale, an interest, which would be voidable upon the sale, if he pays the amount requisite to prevent such sale. It is worthy of notice that the Act goes on to provide that the lien in favour of the person making the payment shall take priority over every other charge on the tenure or holding other than a charge for arrears of rent (Act VIII of 1885, section 161.) (Cf. Act II of 1864 (Madras) which gives the mortgagee a charge on the land in respect of arrears of revenue paid by him, "but such charge shall only take priority according to the date at which payment was made.")

Revenue
Sale Law.

Another provision of a similar character, but somewhat less ample is to be found in section 9 of Act XI of 1859. That section, after enacting that the revenue in arrear may be tendered in certain cases by a person who is not the proprietor of the estate, goes on to say:—"And if the person so depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said person, which would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit, with or without interest as the Court may determine, from the defaulting proprietor. And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate or share, or part thereof, the amount so credited shall be added to the amount of the original lien."

Salvage
liens.

These enactments rest upon a plain principle of equity, the charges created by them being recognized in most systems of law under the name of salvage liens, an expression not wholly useless nor absolutely misleading, and conveying, notwithstanding the recent protest of an eminent English Judge, a definite meaning, a recommendation not always possessed by some of even the most familiar terms in the English law. In the case of *Nogender Chunder Ghose against Sreemutty Dasi*, although the Act then in

force in terms gave only a personal remedy to the mortgagee (c), their Lordships of the Privy Council observed :—
 “Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person, who had such an interest in the taluk as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the taluk, as against all persons interested therein, for the amount of the money so paid” (XI Moore Ind. App., 241; S. C., VIII Suth. W. R., P. C., 17.) And this dictum of their Lordships was held to justify the mortgagee of a putnee taluq in claiming a lien for payments made by him on account of the head rent due to the zemindar—*Mohesh Chundra Banerjee v. Ram Prosonno Chowdhry* (I. L. R., IV Cal., 539; VI Cal. L. Rep., 289).

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It was thought at one time that the principle laid down by their Lordships in *Nogender Chunder Ghose's* case was applicable to the case of a co-sharer, who was compelled to pay a paramount charge on the joint property when such payment had the effect of protecting the property from sale, and the same rule was applied even in cases where the person who made the payment was not a co-owner, but one claiming under a derivative title as a lessee or mortgagee under some one or other of the coparceners. (*Syed Enait Hosain v. Moddonmuni Shahun*, XIV Ben. L. Rep., 155; *Nobin Chundra Roy v. Rungo Lall Das*, I. L. R., IX Cal. 377; *Ram Dut Singh v. Hurruck Narain Singh*, I. L. R., VI Cal., 549; *Mohesh Chunder Banerjee v. Ram Prossunno Chowdhri*, VI Cal. L. Rep., 28; *Deo Nundon Agha v. Desputty Singh*, VIII Cal. L. Rep., 210.) But these cases cannot now be regarded as law, as they have been overruled by a Full Bench judgment of the Calcutta High Court, and a co-sharer must, at least on this side of India, rest satisfied with a personal suit for contribution, as any payment which may be made by him will not carry with it a right to a lien on the joint property. (*Kimuram v. Hosain*, I. L. R., XIV Cal., 809). A different view, however, has been taken both by the Bombay and the Allahabad High Courts. (*Achut Ram Chundro Pai v.*

Case of co-sharers.

(c) The case arose under a Statute (Act I of 1845) which did not expressly confer any lien on the mortgagee, a privilege which was given to him by Statute for the first time by the Legislature in 1859.

LECTURE IX. *Hori Kamti*, I. L. R., XI Bom., 313; *Lachman Singh v. Saligram*, I. L. R., VIII All., 384.) The law on the subject, therefore, is in a somewhat unsettled state, and must, it is to be feared, continue in that unsatisfactory condition till it is authoritatively settled by their Lordships of the Privy Council, or the Legislature sees fit to interfere.

Uncertain-
ty of the
law.

Coparcenery being the rule in India, it is certainly very desirable that the rights and liabilities of coparceners should be clearly defined, and yet there are perhaps few portions of Anglo-Indian law which are so deservedly open to the reproach of uncertainty. I do not refer here to matters which must be governed by the personal law of the parties, but to those altogether outside the pale of that law, and regulated either by statute or by the general principles of justice, equity and good conscience, which 'high-sounding phrases' only too often mean an exact reproduction and not a careful adaptation of English law. The Indian Legislature has, it is true, occasionally in dealing with certain special matters, embodied in the statute-book some of the general principles of equity, but the result of such fragmentary legislation has been not to assist but rather to embarrass our judges in applying such principles in analogous cases not governed by statute law. A complete code, artistically arranged, is, no doubt, a triumph of legislative skill. But a sincere, and indeed fervent, advocacy of legislation proper as distinguished from judge-made law, is perfectly consistent with a wholesome distrust of the beneficial effect of piecemeal legislation, or as it has been sometimes irreverently called, legislative tinkering. I cannot find a better illustration of what I mean than the recent case of *Kinuram Das v. Muzuffer Hossain* (I. L. R., XIV Cal., 809), in which a majority of the judges came to the conclusion that a part-owner is not entitled to a charge upon the share of his co-sharer for land-revenue paid by such co-sharer as against a purchaser whether with or without notice. It seems to me extremely doubtful, however, whether this conclusion would have been arrived at if the matter had been free from the entanglement created by the provisions of an Act, which, while laying down the procedure regulating sales for arrears of revenue, incidentally gives a right of this kind to a mortgagee, but is wholly silent as to the rights of a part-owner. The inference which was drawn by a majority of the learned judges from

Kinuram
Das's case.

the silence of the legislature was, that a mortgagee alone was entitled to the benefit of a lien. We must remember that the Putnee Regulation, as well as the Bengal Tenancy Act, give a lien to sub-tenants, by whom the head rent is paid, and yet the learned judges were virtually forced to the conclusion that no such right can be gained if the property saved is not a putnee or any other description of under-tenure but a zemindari, or if the person who saves it is not a tenant, but a co-partner. I do not deny, if I may say so without impropriety, that the language of the Act may fairly suggest such an inference; but the inference under the circumstances is not a very strong one. The foregoing case is also an illustration of the canonical authority of the decisions of the English Court of Chancery, although, for reasons which are not quite obvious, very little respect seems to be paid to the decisions of other courts or to principles underlying other systems of law, which at least deserve equal consideration. The subject is too large to be adequately discussed here; but I may be permitted to observe that, although the system administered by equity in England is far more rational than that of the common law, it is, if not in a greater degree, at least equally with the latter, open to the reproach of artificiality (*d*).

But, whatever doubts may exist as to the right of a person interested in making a payment to claim a lien, it is clear that a mere volunteer can claim no such right. A mere volunteer cannot generally say to the owner, "I have saved your property by the expenditure of my money, and am, therefore, entitled to a lien on that property for reimbursement." The person making the payment must have some interest in the property or some right or duty towards the owner impelling him as it were to make the expenditure. And this is the cardinal distinction between maritime salvage liens and those we are now discussing. As Lord Justice Bowen points out, the maritime law for the purposes of public policy and for the advantage of trade, imposes, in such cases, a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea-perils, and the fact that the thing saved was saved under great stress and exceptional circumstances (*Falcke v. Scottish Imp. Ins. Co.*, 34 Ch. D., 234). The analogy is not, therefore, quite complete, because in cases

(*d*) See Note A at the end of this lecture.

LECTURE IX. not governed by maritime law, the owner of the saved property is not under any liability to repay any money which may have been spent by a mere volunteer. Liabilities, it must be remembered, are not to be thrust upon people against their will.

*Moran v.
Mitu
Beebee.*

Again, a salvage lien being entitled to priority (*e*) over all other charges, the principle regulating such liens is subject to a further qualification introduced for the purpose of preventing improper preference being acquired over an earlier incumbrance. No lien in the nature of a salvage can be claimed (I am not here speaking merely of maritime liens), unless the parties who are immediately concerned are communicated with, and they refuse or are unable to make the necessary payment. The rule on the subject, together with the qualifications by which it is guarded, is well illustrated by the case of *Moran v. Mitu Beebee* (I. L. R., II Cal., 58), in which the plaintiffs sought to claim a first charge in respect of certain advances made by them for the purpose of carrying on an indigo factory, and the equity on which they relied was that but for the advances made by them, the indigo on which the defendants had *primâ facie* a first charge could not have been produced, and that the plaintiffs were therefore entitled to a lien on grounds of a salvage character, which, as I have already stated, takes precedence of all other charges. But the claim of the plaintiffs was repelled, both because there was nothing to show that they had any interest in the property when they made the advances, or were otherwise compelled to make the payment, and also because the defendants, the first mortgagees, were at hand and ought to have been applied to in the first instance. The plaintiffs were absolute strangers to the estate and in the situation of ordinary money-lenders, who made the advances not for the protection of any interest of their own, but merely with the expectation of pecuniary gain from the bargain itself. I may observe that the right of the plaintiffs was also rested on another ground, *viz.*, the ground on which managers and consignees of West Indian estates are allowed a lien on their advances, but the Court was of opinion that such liens were exceptional, founded on exceptional circumstances, and could not be extended to the case of the plaintiffs, who were members of a firm in Calcutta in the habit of financing indigo factories, the factories in their turn consigning

(*e*) On the subject of priority generally, see Lecture 12, *post*.

the manufactured indigo for sale to the plaintiffs. In over-
ruling the contention of the plaintiffs, one of the learned
judges (Macpherson, J.) observed "the defendants, the
Mussumats, had a first mortgage as security for a large
sum advanced for the season's manufacture, and no refer-
ence was made to them before the further advances were
taken from the plaintiffs. I am wholly at a loss to compre-
hend on what principle of equity they, who were present on
the spot, and might at any time have been appealed to,
can be held liable to give priority to the plaintiffs, who
were strangers, brought in over their heads without their
consent by the mortgagor's manager. I say this even on
the supposition that the amount now claimed by the
plaintiffs was absolutely necessary in order to enable the
indigo to be manufactured, and that no indigo could have
been made without it" (*Moran v. Mitu Beebee*, I. L. R., II
Cal. 96-97.) In connection with this question, the case of *Hori*
Hori Mohun Bagchee v. Grish Chundra Bandopadhyaya (I *Mohun v.*
Cal. L. Rep., 152) may also be referred to. In this case also *Grish*
the plaintiff sought to claim priority in respect of a certain *Chundra.*
sum of money which was lent by him to the mortgagor
on an ordinary bond for the purpose of paying the rent
of the mortgaged premises. It appeared on the evidence
that the money lent by the plaintiff was actually applied
in payment of the rent, the tenure being thereby protected
from sale and the mortgage security of the defendant
preserved. It was, however, held by the Court that the
plaintiff was not entitled to priority over the mortgagee, be-
cause the plaintiff was a stranger to the mortgaged pre-
mises, and therefore in a very different situation from that
of a co-sharer or other persons having an interest in the
property. These cases, therefore, show that if a person having
no interest in the matter comes forward to discharge a burden
upon the property of another, he cannot, as a rule, claim the
benefit of a salvage lien so as to acquire preference over a
prior mortgagee.

We have seen that the interest which would justify
a salvage advance may be an interest in the prop-
erty which is saved by such advance, either as mortgagee
or sub-tenant, or according to some authorities as part-owner
or even as claimant by way of mortgage, lease or otherwise
under such part-owner. In some countries it would seem
that a mere creditor may claim a salvage lien, and that
even, though his debt may be disputed. Indeed, a well-

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known English writer on the Law of Mortgage goes so far as to think that the equity should be allowed to any one who lends at the instance of an interested person (Fisher, 577; see also the cases cited in the foot-notes). It is, however, extremely doubtful whether our Courts will recognize any such equity in favour of a stranger or even an ordinary creditor. At any rate, care ought to be taken that the so-called equity is not made "an instrument to procure collusive preference over an earlier incumbrancer" (*Angell v. Bryan*, 2 Jo. and Lat., 763). The mischief may be guarded against by insisting, as we have already seen, upon the necessity of communicating, where practicable, with the persons more immediately concerned in making the payment. It must not, however, be understood that a person occupying an independent position, as for instance, a part-owner or a sub-tenant is under any obligation to communicate with a mortgagee, although there may be nothing unreasonable in compelling a puisne mortgagee to place himself in communication with a prior mortgagee before making a salvage advance in respect of the mortgaged premises.

Co-sharer's
lien.

The lien of the co-sharer still allowed in some of our Courts, is an instance of the recognition by our Courts of Justice of a right not expressly given by any statute. This, however, is by no means an isolated case. In the absence of any specific rule, the Indian Courts are bound to administer the principles of equity and good conscience, and thus a good deal of English law has not unnaturally worked its way into our jurisprudence.

English
equitable
liens.

I, therefore, propose to give a short outline of the liens recognised by the English Court of Chancery, pointing out those that have been adopted in this country. Foremost among them is the lien of the unpaid vendor for the purchase-money. It is thus defined by Lord Eldon in *Mackreth v. Symmons*:—"Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money or part of it not being paid as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail—in the one case, for the whole consideration; in the other, for that part of

the money which was not paid." (I White and Tudor, L. C., 361.) If it were not now too late to do so, I should venture to protest against the introduction of this doctrine into our system, if on no other account, at least on account of the number of refined distinctions which have clustered round it in the English law, and which must inevitably be introduced with it. In order to explain myself I ought to state that, in the English law, a vendor may waive his lien either expressly or by implication, and the circumstances which will be sufficient to raise an inference of waiver have given rise to a cloud of distinctions which are extremely refined, and which have produced a degree of uncertainty such as led Lord Eldon to say:—"It would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a Court, in what cases it would not exist." It has been held in England that the lien exists even when the money is secured to be paid at a future day (*Winter v. Lord Anson*, 3 Russ., 488), while the mere taking of a security does not amount to an abandonment of the lien. If, however, the vendor take a totally distinct and independent security, it will then become a case of substitution for the lien. The question, however, in all these cases is simply whether or not the circumstances show a clear and unequivocal intention to give up the lien—a question on which there must necessarily be a great conflict of opinion. It is, therefore, to be regretted that the doctrine should have worked its way into our law. It rests upon grounds altogether different from those on which the lien of the salvor has been recognised. In the case of the vendor of land, it is always open to him to protect himself against the consequences of the fraud or insolvency of the purchaser; and if he does not choose to take the most ordinary precautions, he hardly deserves much sympathy. I need scarcely point out that the case of a person who is obliged to make a payment for the protection of his own interest, is essentially different. But there is another and a still more serious objection, which applies to all legal liens alike. They are neither agreements nor declarations, and are therefore wholly untouched by the Registration Acts. They, however, confer real rights, and a

LECTURE
IX.Mackreth
v.
Symmons.Unpaid
vendor's
lien in
England.

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for value.Registra-
tion of
legal
mortgages.

bond fide purchaser for value might be easily misled. This is a serious evil. We know how it is guarded against in England. The right being merely "equitable," the English Court of Chancery, acting upon a well-known doctrine, will not suffer it to be enforced against a *bond fide* purchaser for value without notice of the lien (*f*). The doctrine itself is a curious illustration of the way in which the rights and obligations of parties have been gradually moulded by equity. We saw that in archaic law it was not easy to make a secret transfer of land. The transaction must be attended with a number of solemnities which served to give it publicity, and the omission of any one of them was fatal to the validity of the transfer. It is hardly necessary to observe that a rigid adherence to the doctrine was likely to lead to considerable hardship, and the Court of Chancery, therefore, allowed in certain cases the same relief as if the plaintiff had acquired a real right, notwithstanding his inability to make out a complete legal title. But, in order to prevent injustice to third persons, equity allowed a peculiar defence to a purchaser for value who may have been misled by the presumable want of publicity. As a fact, in modern times, a conveyance does not necessarily carry with it any greater publicity than a contract, but the old doctrine still remains as a "survival."

In countries in which this peculiar defence is not admitted, the same object is accomplished by the hypothec books in which all transfers of real rights are carefully entered. In the French Code, for instance, the registration of legal mortgages is as compulsory as the registration of conventional securities (Code Napoleon, Book III, tit. XVIII, Ch. II, Sec. 4). But the Indian Statute does not permit the registration of such transactions. This fact of itself ought to induce our Courts to be cautious in the admission of legal liens. If, however, we adopt the law as administered by the English Court of Chancery on this subject, the equitable defence open to a purchaser for value should

(*f*) The above observation applies only where the purchaser has the legal estate. As between two merely equitable titles, the rule *qui prior est tempore potior est jure* holds good, unless there is something to displace the prior equitable lien (*Mackreth v. Symmons*, 15 Ves, 350; Sugden, 682, Ed. 14. But see *Rice v. Rice*, 2 Drew, 73, where it is said that priority of time is the ground last resorted to, that is to say, only where there is no other sufficient ground of preference, and a similar view has been taken in other cases; see the notes to *Mackreth v. Symmons*, 1 White and Tudor, L.C., 355. See also Lecture XII, *post*).

also be admitted. So long as the registration of legal mortgages is not rendered compulsory, any other course must necessarily lead to very great hardship. It may, no doubt, be said that it would be inconsistent with the logic of the law to hold that a real right may not be enforced against a subsequent purchaser; but, as observed by an eminent jurist, logical antinomy is more easily to be borne than a rule which fails to do justice between man and man.

In this country the lien of the unpaid vendor seems to have been very much taken for granted, but, as I have already said, it is too late now to dispute the right (g) (Tremalrav v. The Municipal Commissioner of Hubli, I. L. R., III Bom., 172; Ramlakhan v. Baudan, I. L. R., II All., 711; Hariram v. Danaput, I. L. R., IX Cal., 167.) Curious attempts have occasionally been made to extend the doctrine, but, I need hardly add, without any success. In one case it seems to have been argued that a creditor of the vendor was entitled to enforce the lien, because by mutual agreement between the vendor and the vendee, the purchase-money was to be paid by the vendee to the creditor, who claimed by virtue of that agreement a prior lien over a mortgage executed by the vendee. But the Court refused to countenance any such extension, adding that, although an unpaid vendor has a lien on the property, a creditor of the vendor cannot claim the same right (Hariram v. Danaput, I. L. R., IX Cal., 167.) In another case, a second vendee in possession attempted to resist an action of ejectment by a prior purchaser till the balance of the purchase-money was paid, the second vendee claiming to be the representative of the vendor, but I need scarcely say that the attempt failed (Ramlakhan Roy v. Baudun Roy, I. L. R., II All., 711.) A case may, however, arise where a third person advancing the purchase-money or a part of it, may claim to have the benefit of the vendor's lien—Dryden v. Frost, 3 My. & Cr., 673; Neesom v. Clarkson, 4 Ha., 97).

I shall now treat of some other liens recognised by the English law. A lien arises in favour of a purchaser for purchase-money prematurely paid by him. There is also a lien in favour of partners on the partnership estate, on dissolution, in satisfaction of any demands arising out of the partnership business. An agent also is, in certain cases,

LECTURE
IX.Unpaid
vendor's
lien in
India.Other liens
in English
law.

(g) See sec. 55, para. (4), cl. (6) of the Transfer of Property Act.

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IX.

protected by a lien on property on which he has made advances on account of his principal. Trustees also enjoy a similar privilege of which creditors by whom the advances may have been actually made may be entitled to avail themselves on the principle of subrogation (*In re Johnson*, 15 Ch. D., 553.) A *bonâ fide* possessor may also sometimes claim the right in respect of any outlay made by him (Cooke, p. 421). As a general rule, however, a person is not entitled to a charge, simply because he has laid out money on the property of another. But where the person who makes the outlay is interested in the property, but not as agent or trustee, the question, as we have already seen, presents considerable difficulty. According to the English common law, one tenant in common of a house, who expends money on ordinary repairs, has no right of action against his cotenant for contribution (*Singh v. Dickson*, 12 Q. B. D., 194; S.C. on appeal 15 Q. B. D., 60.) And even in equity, which could not always disentangle itself from the common law, a lien is only allowed in certain cases.

Joint-owner's
lien.

The law on the subject is thus stated by Story:—"Another species of lien is that which results to one joint-owner of any real estate, or other joint-property, from repairs and improvements made upon such property for the joint benefit and for disbursements touching the same. This lien, as we shall presently see, sometimes arises from a contract, express or implied, between the parties, and sometimes it is created by courts of equity upon mere principles of general justice, especially where any relief is sought by the party, who ought to pay his proportion of the money expended in such repairs and improvements, for in such cases the maxim well applies "*Nemo debet locupletari ex alterius incommodo*." (Story's Equity, § 1234.)

Doctrine
of contri-
bution.

But the doctrine of contribution in equity is larger than it is at law; and in many cases repairs and improvements will be held to be not merely a personal charge, but a lien on the estate itself. Thus, for example, it has been held that if two or more persons make a joint-purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements and dies, this will be a lien on the land and a trust for the representatives of him who advanced it. (Story's Equity, § 1236.)

Lien for
repairs.

In many cases of this sort, the doctrine may proceed upon the ground of some express or implied agreement as to the repairs and improvements between the joint-pur-

chasers and an implied lien following upon such an agreement. But courts of equity have not confined the doctrine of compensation or lien for repairs and improvements to cases of agreement or of joint-purchasers. They have extended it to other cases, where the party making the repairs and improvements has acted *bond fide* and innocently, and there has been a substantial benefit conferred on the owner, so that *ex æquo et bono* he ought to pay for such benefit. Thus, where a tenant for life under a will has gone on to finish improvements permanently beneficial to an estate, which were begun by the testator, courts of equity have deemed the expenditure a charge for which the tenant is entitled to a lien. So, where a party lawfully in possession under a defective title has made permanent improvement, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements. So, money *bond fide* laid out in improvements on an estate by one joint-owner will be allowed on a bill by the other if he ask for a partition. So, if the true owner stands by, and suffers improvements to be made on estate without notice of his title, he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate. For, it has been well said: "Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiores." *A fortiori* this doctrine will apply to cases where the parties stand in a fiduciary relation to each other; as, where an agent stands by, and without notice of his title, suffers his principal to spend money in improvements upon the agent's estate. (Story's Equity, § 1237.) On the subject of liens generally, see Burge's Foreign and Colonial Law, Vol. III, pp. 314—377.

LECTURE
IX.And for
improvements.

English equity thus proceeds in a very guarded manner, the explanation of which must be sought in the history of the rise and growth of the equitable jurisdiction of the Court of Chancery. It seems to me that the person who lays out money in repairing a house to which he is entitled in common with others has a much stronger equity in his favour than the unpaid vendor, and yet, although a lien arises in favour of the latter, it is denied to the former. In India properties are very frequently held in coparcenary, and although the remedy may in one sense be said to be in the hands of the coparceners themselves, a partition, as we all know, cannot be had without great delay and expense to the parties. It is, therefore, satis-

Character
of English
equitable
liens.

LECTURE
IX.Growth of
equity in
England.Sir Henry
Maine's
remarks.

factory to notice that the question in this country has been decided on broader principles than those recognised by English equity, which is often merely a pale reflection of Roman law (*Mahomed v. Shaista Khan*, II All. H. C. Rep., 248; *Buzloul Hossein v. Gunput*, XXV Suth. W. R., 170). We must remember that, although equity is much more in accordance with common sense than the common law, and although some of its doctrines are still refining themselves, there are parts which disclose to the student, if I might borrow an expression from physiology, unmistakable evidence of 'arrested growth.' This is very clearly pointed out by Sir Henry Maine in a passage in his *Ancient Law* in which he draws an interesting parallel between Roman and English equity. "It would be wearisome," says the learned author, "to enter on a detailed comparison or contrast of English and Roman equity; but it may be worth while to mention two features which they have in common. The first may be stated as follows:—Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus; after which though the whole Roman world was undergoing a moral revolution, the equity of Rome ceased to expand. The same point of legal history was attained in England under the Chancellorship of Lord Eldon, the first of our equity judges, who, instead of enlarging the jurisprudence of his Court by indirect legislation, devoted himself through life to explaining and harmonising it. If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand and better appreciated on the other than they appear to be among contemporary lawyers. Other misapprehensions, too, which bear some practical fruit, would perhaps be avoided. It is easily seen by English lawyers that English equity is a system founded on moral rules; but it is forgotten that these rules are the morality of past centuries—not of the present—that they have received nearly as much application as they are capable of, and that though, of course, they do not differ largely from

the ethical creed of our own day, they are not necessarily on a level with it. The imperfect theories on the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on equity struck with the completeness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the Chancery jurisprudence contemplated its present finality of form when they were settling its first basis. Others again complain—and this is a grievance frequently observed upon in forensic arguments—that the moral rules enforced by the Court of Chancery fall short of the ethical standard of the present day. They would have each Lord Chancellor perform precisely the same office for the jurisprudence which he finds ready to his hand which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies by which the improvement of the law is carried on. Equity has its place and its time; but I have pointed out that another instrumentality is ready to succeed it when its energies are spent.” (Maine’s *Ancient Law*, pp. 68—70.)

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IX.
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I trust I shall be excused for venturing to suggest that the caution thus indirectly conveyed is not perhaps always borne in mind by Indian judges, who seem sometimes to forget that equity in this country has not yet crystallised into system, but possesses all the fluidity which characterised it in England before it hardened into the shape which it wears in our day. There is very little danger of any rash experiments being made under the name of equity and good conscience, as the professional learning, and I must add, the professional prejudices of the English lawyers, who preside over the superior courts in India, will always prevent any hasty or unnecessary departure from the English law.

Applica-
tion of
English
law in
India.

The principles of justice, equity, and good conscience, however, so long as they do not harden into system, are often extremely vague. They should, therefore, be applied with very great caution. Various liens, for instance, are recognised by the civil law and the continental codes, which find no place in the English system. The lien of the lender who advances money for the purchase of land, or for repairing a building, or of the architect or labourer employed in the construction of any works, is not recognised by the English Court of Chancery; and yet it would

Lender's
lien.

LECTURE IX. be difficult to deny that the creditor in the one case, and the architect in the other, have at least as strong an "equity" in their favour as the unpaid vendor (Code Napoleon, Book III, tit. XVIII, Ch. II.) The truth is, the principles of justice, equity, and good conscience are at best but an uncertain guide, and not unfrequently wear an appearance of vagueness, which, it must be confessed, is rather bewildering to the student of Indian law. Indeed, it may fairly be doubted whether our courts ought not to confine the right to a legal mortgage only to those cases in which, as in the case of the salvor, the person claiming the right could not have protected himself by an express agreement. In every other case the parties may be safely left to take the consequences of their own want of caution.

Solicitor's
lien.

Several other descriptions of equitable liens are also recognised by the law. A solicitor, for instance, has a lien on the fruits of any judgment recovered by him, a privilege, I may add, denied to other classes of practitioners. But the lien will not be allowed to override the right of a party to a set-off, at any rate where the mutual payments are under the same decree (*Baikesserbai v. Narranji Walji*, I. L. R., IV Bom., 353; *Brij Nath v. Juggernath*, I. L. R., IV Cal., 742.) A solicitor, however, who discharges himself forfeits his lien (*In re McCorkindale*, I. L. R., VI Cal., 1; Cf. *In re Wadsworth*, 34 Ch. D., 155, where the solicitor at the time the fund was recovered was held entitled to priority over the solicitor who had conducted the action, but had been discharged before the trial.) In certain cases servants and labourers have a lien for their wages—(In the matter of the Indian Companies Act 1866, II Ind. Jur., N. S., 180; II Ind. Jur., N. S., 257.) Maritime liens form also a very important class of securities, but they are of very little practical importance to the Indian lawyer. (See on the subject Fisher, pp. 166—171; see also Coote, pp. 604-606.)

Distrain.

In this country, generally speaking, the land-revenue is a paramount charge, and the sale of a tenure for rent has also in many cases the effect of sweeping away all incumbrances; but I do not think that it would be quite correct to say that there is a lien in such cases. A modified right in favour of the landlord is, however, recognised by the legislature under the name of distraint, and this is strictly a legal lien, and would apparently take rank above all other charges.

I shall now treat of one or two cases in which it is sometimes thought that a lien exists. It is sometimes said that a Mahommedan widow has a lien on the estate of her husband for dower due to her. The question was very fully discussed in the case of (*Amanee v. Mir Meher Ali*, XI Suth. W. R., 212), and the Court, after a review of all the authorities, came to the conclusion that the widow has no special charge on the property, but ranks *pari passu* with other ordinary creditors. (See also *Shah Enayet Hossain v. Syud Romzan*, X Suth. W. R., 216.) But dower, like every other debt, must be paid before the heirs are entitled to take anything, and the authorities show that a Mahommedan widow, in possession of her husband's estate, upon a claim of dower, has a lien upon it as against those entitled as heirs, and is entitled to the rents and profits till the claim of dower is satisfied. (See Macnaghten's Precedents, case 24, p. 275. *Womatul Fatima v. Mirunnissa*, IX Suth. W. R., 318, reported also in VIII Suth. W. R., 51.)

LECTURE
IX.No lien for
dower in
Mahomme-
dan law.

A similar right is sometimes put forward on behalf of the creditor of a deceased Hindu, but it is now conclusively settled that a creditor has no lien on the assets in the hands of the heir, and cannot, therefore, reach any property which may have been transferred by the heir in good faith to a third party. Sir Thomas Strange, indeed, in his book on Hindu law, says, that "debts are a charge on the inheritance, and that they follow the assets into whatsoever hand it comes." (Strange's Hindu Law, Vol. I, p. 166.) And the learned author cites the very high authority of Colebrooke in support of his opinion. (Strange's Hindu Law, App., p. 282.) There is also the text of Katyayana:—"If any debts exist against the father, his son shall not take possession of his effects. They must be given to his creditors." (Stokes's Vyabahara Mayukha, p. 122.) Our Courts, however, have laid down a different doctrine, although it may fairly be doubted if this is not one of the many instances in which English lawyers have unconsciously introduced the doctrines of their own law, moulded by the commercial necessities of the country into a system comparatively archaic, and not shaped by such economic considerations. The Sudder Dewany Adawlut, presided over by Judges not so familiar with English law, adhered to the doctrine laid down by Strange and Colebrooke. But the law has been differently interpreted in

No lien of
a Hindu
creditor.

LECTURE recent decisions. In the case of *Zaburdust Khan v. Inder-*
 IX. *man* (Agra F. B., 71), the Court, in giving judgment,

Zaburdust
 Khan's
 case.

observed :—"In our judgment the real test to be applied in deciding the issue of law raised is to be found in the answer to the question—to whom does the property pass on the death of the deceased? Does it pass immediately and entirely to his heirs, or is the normal devolution interrupted, so that the whole or a portion of the estate sufficient to discharge his debts, vests, as if by hypothecation, in the creditors, and does only the residue pass to the heir?

"We can find no authority for the latter proposition; nor has any other text been cited in support of it than that from *Katyayana* referred to by the Division Bench. Although Sir T. Strange enumerates debts among the charges on the inheritance, he nowhere expresses himself to the effect, that any interest in the inheritance vests in the creditor; on the contrary, the language used by him rather shows that the whole estate of the deceased's ancestor passes to his heirs, affecting them with a liability for the debts of the ancestor to the extent of the assets received by them. The heirs may, if they please, avoid this liability by disclaiming the estate, but into the hands of whatever volunteer it comes, the liability attaches on him; and so long as the estate remains in the hands of the heirs or any other volunteers, so long does it constitute a fund, to which the creditor is entitled to have resort for satisfaction of his claim. This is in our opinion the correct interpretation of the dictum that debts follow the assets into whatsoever hands they come. We have examined the authorities referred to by Sir T. Strange on this point, and can find nothing in them which warrants any stronger position in favour of creditors than that which we have expressed above. The text of *Katyayana* may, at first sight, seem to justify the contention that the whole estate of a deceased ancestor does not pass directly to the heirs; but that there rests in them only the residue after satisfaction of the debts. But this text must be read in connection with other texts of writers of high authority on Hindu law; and so reading it, we are of opinion, that the proper construction of it is to hold, that it declares that the resulting benefit to the heirs from the succession cannot be greater than the surplus of assets over liabilities; not that the estate does not altogether and absolutely vest in the heirs. Numerous texts may be referred to,

which indicate a power in the heirs to deal with the whole estate before satisfaction of the debts. The very fact that they may sell it to satisfy debts shows an ability to make a good title to the whole of it.

"The construction of the texts of Katyayana in the sense contended for on behalf of the appellant is therefore untenable." (See also *Annopurna Dassee v. Gunganarain Pal*, II Suth. W. R., 296; *Jamiyatram Ram Chunder v. Parbhu Das Hathhi*, IX Bom., 116; XII Bom., 78; compare N. W. P., 1859, p. 23; Mad., S. D. A., Vol. I, p. 166; *Greender Chunder v. Mackintosh*, I. L. R., IV Cal., 877.)

It would seem that although a Hindu widow has, in a certain sense, a lien on the estate of her deceased husband for maintenance, the charge cannot be enforced against a purchaser for value without notice of the lien. At any rate the widow cannot seek to charge the estate in the hands of a purchaser without showing that there is no property of her deceased husband in the hands of his heirs (*Adhiranee Narain Kumaree v. Shona Malee*, I. L. R., I Cal., 365; see also VIII B. L. R., 225; IX B. L. R., 11; XII Bom., 69; compare II Agra, 42; IV Moo. Ind. App., 246; I All., 191.)

A notion also seems to prevail that in this country there is a lien on an indigo factory, or at least upon the produce of the factory for the price of seed supplied to it. But the proposition rests on no authority, and was expressly negatived in the case of *Monohur Dass v. McNaghten* (I. L. R., III Cal., 231.) It is, however, curious to observe that the Code Napoleon recognizes a lien in the nature of a privileged hypothecation for sums due for seed corn or for the expenses of the harvest of the year on the value of such harvest. (Code Napoleon, Art. 2102.)

I now come to judicial liens or attachments. Now, an attachment under the Civil Procedure Code may be either before or after judgment; the process being intended in both cases to guard against the alienation of the property by the defendant. It does not fall within the scope of the present lecture to discuss all the various points in connection with attachments. I shall confine myself only to the operation of an attachment under the code. Now, an attachment operates from the moment that the process is executed as a charge on the property, the judgment itself not having the effect of creating in this country a lien on the property of the judgment-debtor. But, in order to have the benefit

LECTURE
IX.

Widow's
lien for
mainte-
nance.

Indigo
liens.

Judicial
liens.

LECTURE of an attachment, the provisions of the Procedure Code
IX. must be carefully followed. In one case in which the notice of attachment was not fixed up in the Court-house, or in the office of the Collector, the Court thought that an alienation made by the debtor could not be avoided by the creditor. Mr. Justice Macpherson, in giving judgment, observed :—

Inderchand
 Babu's
 case.

“The objection is by no means a technical objection. The affixing the notice in the Court-house and in the office of the Collector is a far more certain means of giving information to the parties immediately interested than the process of reading the notice aloud on the land or on some place adjacent to it. A man can always arrange so as to keep himself acquainted with all notices fixed up in the Court of the Judge or the Collector of a District. But there can be no certainty that he will happen to hear, or to be made acquainted with, orders which are merely read aloud on his land or on some place adjacent to it. In the case before us, it is not proved that the judgment-debtor was in personal possession of the lands which were the subject of attachment, and there is nothing whatever to show or to lead to the presumption that he was acquainted with the fact of the order of attachment having been read aloud by the peon who was sent to attach the property. The probability of the judgment-debtors having known that the attachment had been issued, would have been far stronger, if the order had been fixed up in the Court-house or in the office of the Collector.

“Section 240 says that alienations after attachment are to be void, if the attachment or the written order ‘shall have been duly intimated and made known in manner aforesaid.’ The words ‘manner aforesaid’ relate to the provisions of Section 239, and when two out of the three methods prescribed by that section for intimating and making known attachments have been wholly omitted, it cannot possibly be said that the order of attachment was duly intimated and made known within the meaning of Section 240.” (*Inderchund Baboo v. The Agra Bank*, X Suth. W. R., 264; *Devendra Nath Sanial v. Torak Chunder Bhattacharjee*, and *Ramkumar Ghose v. Baikontnath Sanial*, X Cal., 281; I. L. R., VII Cal., 107.) Again, there must be a debt in existence to support an attachment. Thus where an attachment was issued under an *ex parte* decree, which was afterwards set aside on an application for a

new trial, but was subsequently restored, it was held that the attachment previously issued had not the effect of invalidating an intermediate sale. (*Jagat v. Tulsiram*, I. Ben. L. Rep., 71, A. C.)

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An attachment under the code constitutes a perfect real security. The judgment-debtor may not alienate the property, the purchaser under the execution following upon such attachment not being bound by any transfer made by the debtor subsequently to the attachment. What passes to the purchaser is, therefore, not the rights and interests of the debtor as they stand at the time of the sale, but the rights and interests of the debtor as they stood at the time of the attachment. The alienation will, however, be void only as against claims enforceable under the attachment. It must, however, be borne in mind that an attachment does, to a certain extent, enure to the benefit of all the judgment-creditors. Thus, suppose A attaches property belonging to his judgment-debtor worth 5,000 rupees, and that the debt due to A is only 1,000 rupees. Now, if the debtor should sell the property to a third person before it has been attached by any other creditor, and the property should eventually be sold under an execution, the balance of the purchase-money will not be paid over to the purchaser, but will be distributed among such of the other creditors as may have taken out execution prior to the order for distribution. (Section 295, Act XIV of 1882.) It should be observed that the mere fact that a particular attaching creditor is paid out of the proceeds would not avoid an incumbrance if the sale did not take place under that attachment. (*Guruprasad v. Binda*, IX Ben. L. Rep., 180; *Umesh Chunder Roy v. Rajbulbh Sen*, I. L. R., VIII Cal., 279; *Hazir Gazi v. Sonamonee Dasse*, I. L. R., VI All., 33.)

Attach-
ment be-
fore judg-
ment.

In conclusion, it is necessary to observe that, if an attachment has been permanently struck off, and a new attachment has become necessary, a conveyance which is executed between the two attachments will be valid (*Govindo Sing v. Mir Mushun Ali*, S. D. A., 1855, p. 244.) A question of much greater difficulty arises when the conveyance has been executed while the first attachment was subsisting. Does such a conveyance become valid by relation, or is it void against the execution-creditor and those claiming under him. In the case of *Puddomoney* against *Roy Muthooranath Chowdry*, the Privy Council observ-

Striking
off of at-
tachments.

LECTURE IX. — ed:—"It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file, such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained (*Puddomoney Dassee v. Roy Mathuranath Chowdry*, XX Suth. W. R., 133, over-ruling *Ramchurn Lall v. Jhahbur Sahoo*, XIV Suth. W. R., 25.)

NOTE A.

Salvage
liens in
England.

It is said by Mr. Justice Wilson in the case of *Kinuram Das*, I. L. R., XIV Cal., 809, that the doctrine of salvage liens, acted upon in some Irish cases, has been authoritatively rejected in England by the Court of Appeal in *Falcke v. Scottish Imperial Insurance Company* (34 Ch. D., 234.) It seems to me, however, with great deference, that all that the case lays down is that the owner of the ultimate equity of redemption is not entitled to claim a charge in the nature of salvage. Another principle, as I understand it, involved in the case is, that a person who officiously makes a payment, although such payment may have the effect of saving another's property, is not entitled to a lien in the absence of any acquiescence or lying by on the part of the owner or of any request, either express or implied, in the sense of the English law, and the observations of the Court with regard to the inapplicability of the principle of maritime salvage liens were made with reference to the facts of the case. This is shown as well by the arguments of counsel as by the judgments of the learned judges, who took part in the decision. For instance, it was argued for the appellant that in order to establish any claim, the person who made the payment must prove that he had an interest in the policy or that he was requested to make the payment. It was said that a man cannot by paying a debt due from A B without any request from A B make himself A B's creditor, and *a fortiori* he cannot by so doing give himself a lien on property. And Lord Justice Cotton, in giving judgment, said: "If here there had been circumstances to lead to the conclusion that there was a request by Falcke that this premium should be paid by Emmanuel, then there would be a claim against Falcke or his representative for the money; and I do not say that there might not be a lien on the policy," page 241. So also Lord Justice Bowen says: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or

Falcke's
case.

benefited, nor, even if standing alone, create any obligation to repay the expenditure," (p. 248). Further on, the learned Judge, after pointing out that there was no express or implied request to Mr. Emmanuel to make the payment, adds: "*So much therefore for the idea of a lien or even of a right to be repaid this sum at common law*" (p. 250). Similarly Lord Justice Fry says: "I exceedingly doubt whether a mere request by a mortgagee to his mortgagor, though it might give rise to an action for the recovery of the sum paid, would create a lien as against the mortgagee upon the property saved by the payment, *but it is not necessary to discuss that point*" (p. 252). I may add that the true distinction between a maritime salvage and the case before the Court to which it was attempted to be likened, consists in the fact that in the former it is not at all necessary that the person who claims the lien should be under any compulsion to make the payment. In this country, for instance, if a third party voluntarily pays the revenue, he will not be entitled to recover the money from the owner personally or from the property itself, on grounds of a salvage character, but the case is very different where the payment is made by a person who has an interest of his own to protect, in which case a request will be implied by the English law, although it would be, perhaps, more scientific to say that the obligation here arises out of a quasi-contract. In some cases in England, however, premiums paid by persons claiming but not really possessed of any *bonâ fide* interest in the policy or even by the mortgagor himself have been treated as salvage payments. (See the cases cited in *Falcke v. Scottish Imperial Insurance Company*; also *White and Tudor's Leading Cases*, vol. II, p. 1242). But these cases can scarcely now be regarded as law. And the same observation will to a certain extent apply to the case of *Grinder Chunder v. Mackintosh* (I. L. R., IV Cal., 897) where the Court said that as the avowed purpose for which the mortgage in that case was made was to raise money for payment of the government revenue, the payment of which would be in the nature of insurance of the mortgage property, the mortgagee was entitled to priority.

I may mention that English equity does in some cases unquestionably allow a lien to a part-owner or other person having a limited interest in respect of repairs and even improvements made by them, and there seems to my mind to be no difference in principle between an outlay for repairs and one for payment of head rent, except perhaps that in the latter case the equity is much stronger. (See the cases cited and reviewed in the judgment of Mr. Justice Mitter.) In addition to these cases, we may refer to *Exp. Linden* (I. M. D. & D. 428) in which it was held that where a man agrees to sell his estate and to lend money to the purchaser, he will have a lien for the advances so made as well as for the purchase-money. (Cf. *Neesom v. Clarkson*, 4 Ha. 97; *Harris v. Poyner*, 1 Drew, 174, XVI Jur., 880; *Macnolty v. Fitzherbert*, III Jur. N. S. 1237, M. R.; *Barrington's Sett*, 1 Jo. and H. 142; 6 Jur. N. S. 1073, where the tenant for life was allowed for repairs and improvements). I may add that the principle has now been to a certain extent adopted by the English Legislature (8 and 9 Vict., c. 56, 9 and 10 Vict., c. 101 and 10, and 11 Vict. c. 11 and 113). A lien has also sometimes been allowed in favour of a tenant in common for payments in respect of the estate. (*Doddington v. Hallett*, 1 Ves. S. 497; *Exp. Leslie* 3 L. J. N. S. Bk. 4; *Harrison Exp.*, 2 Rose 76; *Lake v. Gibson*, 1 Eq. C. A. B. R. 291). Indeed, the English Court of Chancery has sometimes gone so far as to recognise a lien in favour of *bonâ fide* possessors for permanent improvements made by them (*Neesom v. Clarkson*, 4 Ha. 97; *Thorne v. Newman*, Finch 38. See *Suan v. S.*, 8 Pri. 518; *Ludlow v. Grayall*, 11 Pri. 58; *Unity Bank v. King*, 25 Beav., 72; 4 Jur. N. S. 470). The lien of consignees of West India Estates is a recognition of an analogous right which was no doubt originally forced on the English courts of equity by reason of

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the difficulty of carrying on cultivation in the colonies without the assistance of consignees in England. (3 Burge's Foreign and Colonial Law, 359. Coote's Mortgage 422. Fisher's Mortgage 148). On a similar principle a salvage lien may be claimed by a manager of certain undertakings by reason as well of the perishable nature of the works as of the exigencies under which they are carried on. (Fisher's Mortgage 147). I may add that, although mere co-owners have no such lien as is enjoyed by co-partners in the English Law, a part-owner of a ship has a right to have the gross freight applied in the first instance in payment of the expenses incurred in earning it. (Lindley on Partnership, pp. 683-84.)

Case of
joint-ten-
ants.

I ought to mention that, to my mind, not only is the joint-tenant or other limited owner entitled to a lien, but that seems to be the only appropriate remedy, as the other owners are not bound to keep the property against their will, and indeed this is one of the arguments which was employed by the Court of Appeal in *Leigh v. Dickson* (15 Q. B. D., 60), where the Master of the Rolls, in holding that one tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution, says: "If the law were otherwise a part-owner might be compelled to incur expense against his will; a house might be situate in a decaying borough, and it might be thought by one co-owner that it would be better not to repair it, p. 65. This objection, however, which applies only to a personal action for contribution, will be obviated if you restrict the part-owner to proceedings *in rem*."

It seems that in the Civil Law and the systems founded on it, a lien may be claimed by a person who advances money for the purpose of repairing or rebuilding a house. It may also be claimed in respect of expenditure incurred by a person possessing only a limited estate. (Burge's Foreign and Colonial Law, Vol. III, pp. 346-377.)

LECTURE X.

Subrogation—Application of rule—Rights of puisne incumbrancers—Rights of surety—Entitled to benefit of securities held by creditor—How far discharged by relinquishment of security—Security not relinquished by payment—Rule of English law—Followed in India—Co-debtors—How far entitled to benefit of securities—Purchasers of mortgagor's rights redeeming a mortgage, how far entitled to benefit of subrogation—Other cases illustrative of the rule—Contribution—Principle on which founded—Doctrine followed in India—Marshalling of securities—Rule of English law—Adopted by our Courts—Distinction between purchasers and incumbrancers—Notice immaterial in the case of a mortgage.

IN the last lecture I treated of the various circumstances Subroga-
tion. under which a lien is created by operation of law, independently of the assent of the parties between whom the relation is created. In the present lecture I propose to discuss a class of securities which, although distinguishable from the class considered in the last lecture, have yet some features in common with them. I refer to cases in which a person, by whom an incumbrance is discharged, is sometimes allowed to stand in the place of the mortgagee, and to avail himself of the security in precisely the same way as if the mortgagee had assigned it to him.

The doctrine of subrogation, as it is called, rests upon the plainest principles of justice and equity, and is recog- An equit-
able prin-
ciple. nized in almost every system of law. You must not, however, suppose that every person who discharges the mortgage-debt is entitled to the benefit of the security held by the mortgagee. As a rule, in the absence of an assignment of the security, the person by whom the debt is discharged has no right to avail himself of it. The discharge of the debt extinguishes the security, and the doctrine of subrogation or involuntary assignment is, in reality, an exception to this rule.

We have seen that every person who is entitled to redeem Applica-
tion of rule. acquires, on redemption, the right to stand in the place of the mortgagee, and that it is not necessary that he should obtain an actual assignment of the mortgage in order that he may avail himself of the security. But there are other cases also in which the discharge of a debt secured by a

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mortgage is followed by the same result. A surety who pays the debt due from his principal is entitled to enforce any security against the debtor possessed by the creditor. "A surety," to use the language of Sir S. Romilly, in his argument in *Craythorne v. Swinburne*, "will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor." The surety is entitled to the benefit of the securities, although he may not have been aware of their existence, and although they may have been taken by the creditor after the contract of suretyship has been entered into (Sections 140-141 of the Contract Act; consider *Forbes v. Jackson*, 19 Ch. D., 615, and cases cited therein). It seems that the fact that the creditor has made further advances on the security will not affect the right of the surety on paying off the original debt to claim an assignment (*Forbes v. Jackson*, 19 Ch. D., 615, overruling *Williams v. Owen*, 13 Sim., 597.) Indeed in some cases the effect of making further advances might be practically to discharge the surety altogether. (*Mutual Life Assurance Co. v. Longby*, 32 Ch. D., 460; *Beevor v. Luck*, L. R., 4 Eq., 537.) The creditor is not entitled to apply the security to the discharge of any other debt than that guaranteed by the surety. (*Pledge v. Buss*, Johns., 663.) But when the security is given after the contract of suretyship for the debt guaranteed by the surety as well as for other debts of the principal, the creditor is not bound to apply the proceeds either preferentially in payment of that debt or *pari passu* in payment of all the debts, there being no principle of law or equity by which the rights of the creditor can be so controlled in favour of the surety. (*Bank of Bengal v. Radhakissen*, III Moore Ind. App., 19.) I may here mention that, as between themselves, sureties are entitled to the benefit of all securities which may have been taken by any one of them to indemnify himself. But it seems the surety is only entitled, as against the creditor, to the securities given by the debtor, not those given by the co-sureties. (*Duncan v. N. W. Bank*, 11 Ch. D., 88.) (As to marshalling against sureties and on the

rights of sureties generally, see DeColyar on Guarantees, LECTURE X. pp. 296-298.)

In a late case in the Calcutta High Court, the question arose whether or not a surety, by whom the debt had been paid, could proceed against the original debtor upon the instrument itself by which the debt had been created. The facts were shortly these: the plaintiff brought a suit in the nature of an action of ejectment upon a mortgage, which had been regularly foreclosed. The defence was that, prior to the mortgage under which the plaintiff made title to the property, the debtor had borrowed money from a third person on the security of that very property, and that the defendant was his surety on that occasion. The money not having been repaid by the principal debtor, the defendant paid the debt, and the creditor, at his instance, brought an action against the debtor on the mortgage bond; and in execution of the decree obtained by him, the property in dispute was sold and purchased by the defendant. In this state of facts it was contended for the plaintiff that the payment by the surety discharged the debt, and consequently extinguished the security; and that the defendant under his purchase acquired only the rights and interests of the debtor as under an ordinary execution, and that, as the plaintiff's mortgage was prior in date to the defendant's purchase, the facts stated in the defence were no answer to the plaintiff's suit. This contention was, however, overruled, and Mr. Justice Markby, in giving the judgment of the Court, said:—"We must decide the question by analogy of the law of other countries; and it appears to us clear, that, by the law of England and the law of Scotland, and, as far as we are aware, by the general law of Europe, when a surety has paid off the debt of his principal, not only all the collateral securities are transferred to the surety, but by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. It seems to us, therefore, that the law of this country may be reasonably taken to be that which has been considered equitable in other countries, namely, that the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt by reason of the debt having been paid by himself." (*Heera Lall Samunt v. Syud Oozeer Ali*, XXI Suth. W. R., 347.)

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Heera Lall
v.
Oozeer Ali.

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Mercantile
Law Act.

The English law on the subject is now contained in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), which provides that "every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity to use the name of the creditor, in any action or other proceeding at law or equity, in order to obtain from the principal debtor, or any co-security, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person, who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him."

Rights of
surety.

The surety being entitled to use against the principal debtor every remedy which the creditor himself could have used, it follows that, if the principal creditor improperly deals with the securities or relinquishes them, the surety will be discharged, at least (a) to the extent of the value of the security (Contract Act, Sec. 141, *Narayan v. Gonesh*, VII Bom. H. C. Rep., 118.) But there is an important distinction between securities existing at the time that the contract of suretyship is entered into, and those which are taken subsequently. A surety is entitled to the benefit of the former class of securities absolutely; but, as regards the latter, his right to avail himself of them arises only when he actively puts himself in motion (Secs. 141, 142 of the Contract Act.) These provisions of the Indian Act seem to have been modelled on the English case of *Newton v. Chorlton* (10 Hare, 646) a case, however, of more than doubtful authority (see *Forbes v. Jackson*, XIX Ch. D., 615; *Campbell v. Rothwell*, XLVII L. J. Q. B., 124; XXXVIII L. T., 33.) The

(a) I say *at least*, because the provisions of the Contract Act are very far from being distinct on the point. Compare Section 139, illustration (b), with Section 141 of the Act.

surety, however, will be discharged only if the creditor is guilty of misconduct or wilful neglect, as he is not bound to make the most of his securities, although no doubt on general principles he must conduct himself with good faith towards the surety.

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You will observe that the English Statute, following in this respect the law of other countries, allows to the surety not only the benefit of any security possessed by the creditor, but also the benefit of any judgment which may be held by the creditor. The same right is extended to one of several debtors who may have been obliged to pay the whole of the debt due to the creditor. The co-debtor has the same equity as the surety, and ought in justice to have the same facilities for reimbursement. It is true that there are some expressions in the judgment of the Court in *Degumburee Dabee v. Eshan Chunder Sen* (IX Suth. W. R., 230), which would at first sight seem to show that a co-debtor cannot have the benefit of any securities held by the creditor; but the point really decided in the case was, that a co-debtor purchasing a judgment against himself and the other debtors, had no right to issue execution on the judgment for the purpose of recovering the whole amount from the other debtors. It is, however, unfortunate that the Court should have rested their judgment in great measure upon the English case of *Dowbiggin v. Bourne* (2 Young and Collyer, 462), which followed *Copis v. Middleton* (Turner and Russell, 231), in which a somewhat refined distinction was taken between securities that were merged by the judgment, and those that were available to the surety notwithstanding the judgment. The rule, however, laid down in those cases was considered to be unsatisfactory; and, as we have already seen, the English Legislature has since passed an Act for the purpose of giving increased facilities to sureties and co-debtors for reimbursement.

English
law on the
point.

I have already said that, as the law stands at present, one of several joint-debtors cannot have the benefit of any judgment held by the creditor. The procedure of our Courts in matters of execution is ill adapted to the determination of the various questions which must necessarily arise in such cases; but, as I have already pointed out, it does not, by any means, follow that the debtor will not be permitted to avail himself of any securities held by the creditor, and which the creditor might have enforced

Case of
joint-debt-
ors.

LECTURE X. — against his debtors. I may here remind you that where a person who is only interested in a portion of the mortgaged premises is compelled to pay the whole debt, he will be entitled not only to contribution, but also, as we have seen, to a lien on the share of the other mortgagors. (*Punchum Singh v. Ali Ahmad*, I. L. R., IV All., 58; *Bhagirath v. Nanbut Singh*, I. L. R., II All., 115; *Hira Chand v. Abdul*, I. L. R., I All., 455; *Gobind Pershad v. Dwarka Nath*, XXV Suth. W. R., 259.) And it would seem that he will not be deprived of this right, although the mortgagee by bringing his action against only one of the parties might have put it out of his power to bring a second suit on his mortgage. (*Jagut Narayan v. Qutub Husain*, I. L. R., II All., 807.)

Other application of the rule.

There are several other cases in which the law allows a person who discharges an incumbrance to stand in the place of the mortgagee. A purchaser of the debtor's equity of redemption, who pays off incumbrances on the purchased property in order to acquire a safe title, may, under certain circumstances, use such incumbrances as a shield against the claims of a subsequent incumbrancer who may not have been paid off. (*Syud Ajid Hossein v. Hafiz Amed Reza*, XVII Suth. W. R., 480; and cases cited therein. Compare *Raghu-nath Prasad v. Jurawan Rai*, I. L. R., VIII All., 105.) (b) The question, however, is not entirely free from difficulty, and I reserve a fuller discussion of it for the last lecture. Many other instances of subrogation will also be found in the books. Thus, in the case of *Syud Mohamed Shamsal Hasla v. Shewak Ram*, which was a suit by a reversioner to avoid a conveyance by a Hindu widow, it appearing that there was a valid mortgage upon the property for a certain sum which had been redeemed by money paid into Court by the defendant, the Court refused to make a decree for the plaintiff, except on the condition that the

(b) In *Dilowar Sahoy v. Bolakee Ram*, I. L. R., XI Calc., p. 258, where a purchaser of a mortgaged property with whose money a prior mortgage had been paid off claimed to be entitled to the benefit of the first security, the Court was of opinion that, in the absence of anything to show the relative dates of the conveyance and the discharge of the mortgage debt, or that the money was paid by the purchaser himself and not by the vendor out of the purchase-money, the purchaser was not entitled by subrogation to the benefit of the first mortgage. This, however, would seem to be somewhat unduly tightening the meshes of technicality (see the observations of their Lordships of the Privy Council in *Gocool Dass v. Pooran Mull*, I. L. R., X Calc., 1035 Cf. 1044). See also Lecture XII, *post*.

plaintiff should pay to the defendant the amount of the mortgage which had been redeemed by him. (XIV Suth. W. R., 315; S. C., on appeal, XXII Suth. W. R., 409; *Nilopandurang v. Ramaputtoji*, I. L. R., IX Bom., 35; *Kuvarji v. Moti Haridas*, I. L. R., III Bom., 234; *Baikesar v. Dullabh*, VIII Bom. H. C. Rep., 31.) An analogous rule is followed when a conveyance is set aside, the Court frequently directing that the conveyance should stand as a security for the amount actually advanced to the plaintiff, or applied to his benefit.

I now come to the subject of contribution. This involves the determination of the proportions in which two or more owners of an estate, subject to a common charge, ought to contribute to its redemption, or what is the same question under another aspect, the extent of the right which one of such persons, who has been compelled to discharge the common debt, has to be reimbursed by the others. This is only a branch of the general law of contribution, and rests on the plainest principles of justice and equity. Any other rule would leave it open to the creditor to select his own victim, and from caprice or favouritism what ought to be a "common burden" might be turned into "a gross personal oppression." We have already seen that a mortgage-debt is one and indivisible, and if several distinct parcels of land are hypothecated to the creditor, and subsequently pass to different purchasers, the creditor may proceed against any one of those parcels; and the only way to prevent a sale or foreclosure would be to tender to him the whole of the mortgage debt. It is but reasonable that, in such a case, the person who is compelled to discharge a common burden, should be permitted to seek indemnification from the other purchasers, and no fairer rule can be suggested than that each of the purchasers should contribute according to the value of the property purchased by him. (*Bhojrab Chunder Moduk v. Nudear Chand Pal*, XII Suth. W. R., 291; *Kaliprosonno v. Kamini*, I. L. R., IV Calc., 475; *Newmarch v. Storr*, 9 Ch. D., 12) (c). It would

(c) The same rule holds good. where the properties are subject to two or more incumbrances, thus where three properties were twice mortgaged, and the second mortgagee afterwards at an execution sale purchased the interest of the mortgagor in two of the properties, each property was held liable to contribute rateably in proportion to its value first to the debt due on the first mortgage, and next to the debt due on the second mortgage. (*Ahmed Beg v. Row Nakhar*) Court minute book

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be manifestly unjust to allow a mere accident to cast upon a particular portion of the land, and, therefore, upon the owner of that portion, a burden which was originally imposed, and which ought in fairness, notwithstanding the proceedings of the creditor, to be laid equally on the whole, and, therefore, on all the purchasers; and, as I have already said, no proportion can be suggested which is so equitable as that of the respective values at the date of the severance.

It would seem, although the point has never been directly raised that, as no personal liability is incurred by the purchaser except where he is under a covenant to pay, the plaintiff will be only entitled to a charge on the portion purchased by the person from whom he seeks to be reimbursed. You will find the law similarly laid down by Story in his *Equity Jurisprudence*:—"Cases may be easily stated where apportionment of a common charge, or, more properly speaking, where contribution towards a common charge seems indispensable for the purposes of justice, and accordingly has been declared by the common law in the nature of an apportionment towards the discharge of a common burden. Thus, if a man owning several acres of land is bound in a judgment or statute, or recognizance, operating as a lien on the land, and afterwards he alienes one acre to A, another to B, and another to C, &c.; there, if one alienee is compelled, in order to save his land, to pay the judgment, statute, or recognizance, he will be entitled to contribution from the other alienees. The same principle will apply in the like case, where land descends to parceners who make partition, and then one is compelled to pay the whole charge; contribution will lie against the other parceners. The same doctrine will apply to cofeoffees of the land, or of different parts of the land." (§ 477.) And again in § 484 the learned author says:—"Let us suppose a case where different parcels of land are included in the same mortgage and these different parcels are afterwards sold to different purchasers, each holding in fee and severalty the parcel sold to himself. In such case, each purchaser is bound to contribute to the discharge of the common burden or charge in proportion

December 20th, 1880, and on further directions December 8th, cited in *Belchambers of the Civil Courts*, p. 327. As to the right to an apportionment at the instance of a puisne mortgagee, see *Gunga v. Hurriah*, VI Cal. L. Rep., 336.

to the value which his parcel bears to the whole included in the mortgage." The principle is illustrated in the case of *Jeetram Dutt v. Durga Dass Chatterjee* (XXII Suth. W. R., 430). It appears that a creditor, who had a charge in the nature of a simple mortgage on two properties belonging to two different persons, levied the whole of the debt from one of the debtors. The person who was obliged to repay the whole of the debt brought a suit for contribution against his co-debtors, and in execution of the decree obtained by him, seized the property which had belonged to his co-debtor, and which formed a portion of the land on which the debt due to the principal creditor was secured. The creditor, who had in the meantime purchased the property, asked that the attachment might be withdrawn, and on the dismissal of the application deposited in Court under protest, the money due to the judgment-creditor, which was subsequently paid away to him. He then brought a suit for the money which he had been obliged to pay under protest, but the Court was of opinion that he was not entitled to recover back the money, apparently because the judgment-creditor had a lien on the land which formed a portion of the property on which the debt was originally secured; and that he was entitled, "in respect of the security given for the original debt, to stand in the same position as the creditor whose claim on that security had been satisfied." (*Bhagirath v. Naubat*, I. L. R., II All., 115; *Pancham Singh v. Ali Ahmad*, I. L. R., IV All., 58; *Asansal v. Vamana*, I. L. R., II Mad., 223.)

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Jeetram v. Durga Dass.

The general rule on the subject is, as I have stated, that if two estates subject to one mortgage come to be owned by different persons, they must rateably bear the burden of the mortgage. But the rule is subject to the proviso that there is nothing to show a contrary intention. Thus, if part of an incumbered estate is sold with a covenant against incumbrances, the burden as between the mortgagor and the purchaser will be thrown entirely upon the residue in favour of the purchaser, and a similar equity will arise in favour of a person to whom part of the estate has been given in exchange. (Consult *in re Athill*, 16 Ch. D., 211, and cases cited therein.) In the absence, however, of any such covenant or any intention to exonerate any portion of the property from the debt, a right of contribution will arise in favour of the person who

General rule on the subject.

LECTURE has been obliged to satisfy the mortgage-debt. It is impossible to lay down any general rule on the subject, as the question must depend upon the language of each document. In a recent case decided by the Calcutta High Court (*Mathura Nath Chattopadhyaya v. Krishna Kumar Ghose*, I. L. R., IV Calc., 369), it appears that the plaintiff and the defendant respectively purchased at different dates portions of a property on which there was a mortgage. In the deed of sale to the plaintiff, which was posterior to that of the defendant, there was an undertaking that the plaintiff would discharge all the liabilities, of the mortgagor, including the mortgage on the property. The mortgagee having obtained a decree against the property, the plaintiff paid off the entire debt, and brought a suit for contribution against the defendant who contended that, having regard to the undertaking of the plaintiff, he was not entitled to claim contribution. I may here mention that it was found as a fact, that the defendant was not aware of the mortgage, and that he had paid a large sum of money for the property which he would not have done if he thought that he was only buying the equity of redemption. But the Court, notwithstanding, gave judgment for the plaintiff upon the ground that there was nothing in the defendant's deed of sale to show any intention of the parties to exonerate the defendant from any liability which the law would cast upon him. The case, however, I am bound to add, seems to be of somewhat doubtful authority.

The English law on the subject is thus formulated in a well-known treatise on the law of Vendors and Purchasers.

"If two estates, X and Y, are subject to a common charge, and estate X be sold to A, A will, as against the vendor and his representatives, have a *prima facie* equity, in the absence of express agreement, and whether or no he had notice of the charge, to throw it primarily on estate Y, in exoneration of estate X (see section 56 of the Transfer of Property Act).

If, then, estate Y be subsequently sold to B, with notice of the charge and of the prior sale of X to A, B purchases with notice of A's equity, and the entire charge must rest primarily on Y.

If B, at the time of his purchase, have notice of the charge as affecting Y, but be not led to suppose that estate X is also subject to it, or if he purchase without notice of the charge, and A purchased with notice of the charge as

affecting Y; in either of these cases, it is conceived, B's equity is inferior to A's, and the entire charge must rest primarily upon Y. LECTURE
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If B purchase with notice of the charge as affecting Y, and with notice of the sale to A, and be led to suppose that X is subject to the charge, or if both purchase without notice of the charge, B's equity would appear in either case to be equal in degree to A's, so that, either party, by taking a transfer of the charge and the securities (supposing them to be such as to give the incumbrancer a claim at law against the two estates), would, it is conceived, be able to throw the charge exclusively upon the other" (d). (Darts' Vendors and Purchasers, Vol. II., pp. 1035, 1036).

Questions of considerable difficulty occasionally arise in cases in which some particular property is said to be the primary security for the mortgage-debt in which case the debt will be thrown entirely on such property instead of being distributed rateably. But the intention that some particular property should be the primary security should be clearly shown. Thus where several properties are mortgaged at the same time by different deeds, the mere fact that one of the mortgages is called a collateral security will not throw the mortgage-debt primarily on the other properties mortgaged to the creditor. (*Early v. Early*, 16 Ch. D., 214; *In re Athill*, 16 Ch. D., 211). So, again, where a debtor mortgages certain land and then mortgages other land for the same debt and further advances the whole amount will *primâ facie* be treated as one debt, and must be borne rateably by the several properties. (*Leonino v. Leonino*, 10 Ch. D., 460, and the cases there cited. See also *Stringer v. Harper*, 26 Beav., 33; *Evans v. Wyatt*, 31 B., 217). But no doubt a person may make a mortgage of two estates in such a manner that though the incumbrancer may proceed against both or either of them yet if the equity of redemption devolves on two or more different persons the estate which was the primary security shall remain the primary security as between the persons claiming under the mortgagor. And it is scarcely necessary to state that the mortgagor may do this not only by

(d) Where the property is subject to a concealed incumbrance, it seems that a purchaser of part, having merely the equitable estate, may throw the entire charge upon a subsequent innocent purchaser of the equitable estate in the residue (Dart, citing *Hartly v. O'Flaherty*, L. & G. temp. P., 208, 216. But see Sugden, Ed. 13, p. 614.)

LECTURE X. express words but by implication; but the implication in such cases must be very clear. (*Marquis of Bute v. Cunningham*, 2 Russ., 275) (e).

I now come to the doctrine of marshalling of securities, which is intimately connected with the right of subrogation, which I have already considered. Whenever a person has a lien on two properties, and another a charge only on one of such properties, the Court will compel the mortgagee whose debt is secured on two properties, to take his satisfaction in the first instance out of the estate not in mortgage to the other, provided that his rights are not in any way prejudiced, or his remedies improperly controlled. The very same result is accomplished in some systems, by allowing the mortgagee who has a mortgage only upon one estate to stand in the place of the other mortgagee, if the latter shall have taken his satisfaction out of that estate (f).

Marshalling of Securities.

The doctrine of marshalling rests upon the principle, that a person having two funds to resort to should not be permitted from wantonness or caprice to disappoint another who has only one fund to go upon. If, therefore, the person with a claim upon two funds elects to proceed against that to which alone the right of the other is limited, the latter will be allowed to stand in the place of the former, and to satisfy his demand out of the other fund.

The result of the English and American authorities on the subject is thus stated by Story in his Equity Jurisprudence (§§ 633, 642, 643):—

Reason of the rule.

“The general principle is that where one party has a lien on or interest in two funds for a debt, and another

(e) In England owing to the distinction between real and personal estates and the somewhat artificial rules on the subject of exoneration acted upon by the Court of Chancery, the Legislature was obliged to interfere by passing several successive statutes, the first of which is known by the name of Locke King's Act (17 and 18 Vict., c. 113, 30 and 31 Vict., c. 69, 40 and 41 Vict., c. 34). As the law now stands in the absence of any expression of a contrary intention in writing, the mortgage-debt must primarily be discharged out of the mortgaged property. I am not aware of any case in this country in which the question has been raised, but if it be ever raised, it will, I take it, be decided on the lines laid down by the English and partly adopted by the Indian Legislature. (See Section 154 of the Indian Succession Act which applies to the Wills of Hindus, &c., in the Lower Provinces of Bengal and in the Towns of Madras and Bombay).

(f) As to the right of the Court to restrain a mortgagee from proceeding fraudulently or oppressively, in addition to the cases cited in Lecture IV, see *Bygonath v. Doolhun*, XXIV Suth. W. R., 83; *Krishen Pertab v. Nundcoomar*, XXV Suth. W. R., 388.

party has a lien or an interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it does not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

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"If A has a mortgage upon two different estates for the same debt, and B has a mortgage upon only one of the estates for another debt, B has a right to throw A in the first instance for satisfaction upon the security which he, B, cannot touch, at least where it will not prejudice A's rights or improperly control his remedies." It is sometimes said that unsecured creditors in this country have no right to compel a mortgagee to resort in the first instance to the mortgaged property so as to leave the other properties free or to allow the disappointed creditors to stand in the place of the mortgagee in the event of the mortgage being satisfied; but as I have already pointed out, there does not appear to be any such general rule. (See Lecture IV.) The case sometimes cited in support of the proposition only lays down that the general creditors cannot compel the mortgagee of two or more estates to resort to any particular property comprised in his mortgage in preference to another. (*Kristo v. Ram*, I. L. R., VI Calc., 142. Cf. *Rajkishor v. Bhadu*, I. L. R., 7 Calc., 78.)

Summary
of English
law on the
point.

I need hardly point out that, ordinarily, a subsequent purchaser of one of the estates has just as strong a claim as a mortgagee. (*Rodhmal v. Ramharakh*, I. L. R., VII All., 711; *Bishonauth Mookerjee v. Kisto Mohun Mookerjee*, VII W. R., 483; *Mussamut Nowa Kooror v. Sheek Abdul Ruheem*, W. R., 1864, p. 374. But see *Lala Dilwar v. Bolakee Ram*, I. L. R., XI Calc., 258 (g).) There is, however,

Rights of
purchaser.

(g) This judgment would seem altogether to negative the doctrine of marshalling, although it has been recognised by our Courts in several reported cases, and also at least partially by the Legislature, see Secs. 81 and 82 of the Transfer of Property Act. It seems to me with great deference that the judgment of the learned Judges is based upon a misapprehension of the dictum of Lord St. Leonards in *Averall v. Wade*. The observation of the Lord Chancellor evidently refers to a case of foreclosure when no one offers to pay the mortgagee off, the mortgagee of two estates having a right to compel the debtor to redeem or to be foreclosed. Lord St. Leonards could scarcely have meant to say that the principle of marshalling was not at all enforceable against a mortgagee of two or more estates. At any rate in India marshalling having been recognised at least in favour of a mortgagee, the only ques-

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this difference between the position of a purchaser and that of an incumbrancer. In the case of a purchaser, if the purchase was made with knowledge of the mortgage and subject to it, there is no reason why, as between the purchaser and the mortgagor, the burden should be thrown in the first instance on the mortgagor; although, as I have already endeavoured to explain, the person who is compelled to pay the whole would be entitled to bring an action for contribution. (*Tadigolla v. Lakshamma*, I. L. R., V Mad., 385.) A mortgagee, however, stands upon a different footing. He has a right to enforce the payment of his debt, and whether the mortgage to him was or was not with notice of the prior incumbrance, the mortgagor cannot complain with reason of any facility which may be offered to the second mortgagee by compelling the prior mortgagee to resort, in the first instance, to the estate which is not the subject of mortgage to the puisne incumbrancer. The case, in fact, is analogous to the familiar case of a mortgagor redeeming the first mortgagee. Such redemption enures to the benefit of the puisne mortgagee, and the mortgagor will not be permitted to say to him "you shall satisfy yourself only out of the equity of redemption on which alone the debt was secured." The point is a very important one, and must be carefully borne in mind. In some of the earlier English cases, you will find it laid down that marshalling could not be insisted upon by an incumbrancer with notice of the prior mort-

tion that can arise is whether or not there is any ground for refusing to enforce it in favour of a *bonâ fide* purchaser for value.

In *Averall v. Wade* all that the Chancellor did, was to refuse to apportion a prior judgment between the settled and unsettled estates in favour of a subsequent judgment-creditor, and threw the whole of such prior judgment upon the unsettled estate on the ground that the judgment-creditor had not got any specific charge. In his Treatise on Vendors and Purchasers, Lord St. Leonards, in referring to the Irish cases of *Hartly v. O'Flaherty*, Beat. 61, and *Averall v. Wade*, says:—"In a case in Ireland where Sir A. Hart and Lord Plunket differed in opinion, in the result they appear to have agreed, that where there is a concealed incumbrance, as a judgment, a purchaser of a portion of the estate cannot be compelled to contribute by a later purchaser of another portion. And the rule was considered to apply equally to the case of a mortgage of the whole estate.

It has since been decided, that whether there is upon the first sale a mere concealment of the judgment, or, *a fortiori*, if there is a declaration or covenant that the estate is free from incumbrances, the first purchaser is entitled to be relieved against the seller and later judgment-creditors claiming under him, so that the estate unsold must bear the whole of the prior judgment-debt, as well as its own subsequent incumbrances." *Vendors and Purchasers*, p. 746.

gage. (*Lanoy v. Duke of Athol*, 2 Atk., 446.) The rule, however, was considered too narrow, and the distinction has since been abolished. (*Gibson v. Seagrim*, 20 Beav., 614; *Tidd v. Lister*, 10 Hare, 157; *Liverpool Marine Co. v. Wilson*, 7 Ch. Div., 507. See, however, sec. 81 of the Transfer of Property Act.)

The doctrine of marshalling has been adopted by our own Courts as a rule founded in equity and good conscience, although it may perhaps be doubted if the reservations by which the doctrine is qualified have been sufficiently attended to in some of the reported cases on the subject.

In the case of *Mussamut Nowa Kowar v. Sheikh Abdul Rohim* (Suth. W. R., 1864, p. 374), one of the estates in mortgage having been sold under an execution levied by an ordinary creditor, the purchaser under the execution resisted the attempt of the mortgagee to enforce his security against the property which had been purchased by himself, without in the first instance proceeding against the properties which still belonged to the mortgagor. The defence was allowed, and the Court, in giving judgment, observed:—"The sale (*i.e.*, the execution-sale) does not release that estate from the mortgage, but it forces the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage-deed. If any balance remains after he has realized all which he can realize from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of funds which are within his power for this purpose, and so placed by the deed; while, on the other hand, very great injustice might be done to other parties by allowing plaintiff to proceed against the estate which has been already sold."

It is probable, although the fact does not appear from the report, that the purchaser bought without notice of the mortgage, and paid, not for the equity of redemption, but for an absolute interest in the property. Even in that case, however, it is extremely doubtful, as I have already explained, if the purchaser under the execution could set up the defence of a *bond fide* purchase for value and without notice of the incumbrance. (*Bapuji Balal v. Satyabhama Bai*, I. L. R., VI Bom., 490; *Kinderly v. Jervis*, 22 Beav., 1; *Beavan v. Earl of Oxford*, 6 De G. M. & G., 507; *Bhikaji v. Yoshvantraw*, I. L. R., VII Bom., 489;

LECTURE X. *Ramlochan v. Ramnarain*, I Cal. L. Rep., 296 ; *Dolphin v. Aylward*, L. R., 4 H. L., 486.)

Cases on
the point.

There are other cases also in the books in which securities have been marshalled, which you may usefully consult. (*Tulsi Ram v. Munu Lall*, I Suth. W. R., 353 ; consider *Bissonath Mookerjee v. Kisto Mohun Mookerjee*, VII Suth. W. R., 483 ; *Chetoosee Churria v. Bany Madhub Dass*, XII Suth. W. R., 114.)

The principle of marshalling, however, as I said, cannot be exercised to the prejudice of a third party. Thus, the Court will not marshal in favour of a second against a third mortgagee. Nor it seems will there be any marshalling to the prejudice even of a person claiming under a voluntary conveyance. If, however, a person by his mortgage takes, expressly subject to and after payment of the prior mortgagees, marshalling may be enforced as against him. (See the Cases collected in II White and Tudor's Leading Cases, pp. 111-118.)

LECTURE XI.

Pledge of moveables—Paucity of authority—Contract Act—Definition of pledge—Validity of hypothecation of moveables—Danger of fraud—Distinction between a pledge and a mortgage of chattels—Power of sale—Pawnee's lien extends to interest and necessary expenses—Extraordinary expenses—Right of pawnee to tack subsequent advances—Rule of English law—Right of pawnee to make use of pledge—Degree of diligence imposed on pawnee—Differences between Indian law and English and Roman law on the point—Pawnor's right to accessions—Right of redemption—Passes to the legal representative—Possessory heirs—General and special—Unpaid seller's lien—May be varied—Right of resale—Differences between Indian and English law—Lien of artificers—Banker's and attorney's lien for general balance of account.

I NOW propose to treat of pledges of moveable property. This class of securities is, by no means, unimportant, although, in a country like India, the wealth of which mainly consists in agriculture, they are not so common as in commercial countries. It is for this reason that there are so few cases on the subject in the books. Pledges, however, occupy a distinct chapter in the Contract Act; and, although it cannot be said that the Legislature has dealt with every point in connection with the subject, it has certainly removed a good deal of that obscurity which must necessarily gather round such a topic in the absence of well-defined rules.

A pledge is defined in the Act to be the "bailment of goods for the payment of a debt, or performance of a promise" (a). But, although the bailment itself is called a pledge, the bailor and bailee are severally called pawnor and pawnee,—a change of phraseology for which it is somewhat difficult to account. The property pledged may be anything of a personal nature, although not goods in the ordi-

Pledge of moveables.

Definition of pledge.

(a) Cf. sec. 58, Transfer of Property Act, where the promise must be such as to give rise to a pecuniary liability. It is said in Benjamin on Sales, p. 14, that there may be a valid pledge, although the goods remain in, or are returned to, the actual possession of the pawnor as trustee for the pawnee, and for this proposition, *Martin v. Reid* (C. B., N. S., 730); *Reeves v. Capper* (5 Bing. N. C., 136), and *Langton v. Waring* (18 C. B., N. S., 315), are cited as authorities. (Cf. *Meyerstein v. Barber*, L. R., 2 C. P., 52.)

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tract Act.

nary sense. Thus, money debts, for instance, choses in action, shares in a company and even patent rights may be given in pledge. (*Kemp v. Westbrook*, 1 Ves., S. 278; *Roberts v. Wyatt*, 2 Taunt, 268) (b).

You will have observed from the definition of a pledge, that it must be accompanied by a delivery of possession, which, it is hardly necessary to point out, may be either actual or constructive; but a mere license to take possession will not be enough. (*Ex-parte Parsons*, 16, Q. B. D., 532.) The Act is silent on the subject of the hypothecation of moveables. I told you in the introductory lecture that, in most modern systems of law, the hypothecation of moveables is, either not permitted at all, or is fenced in by a multitude of rules which are absolutely necessary for the prevention of fraud (c). We do not purchase land without examining the title-deeds, but moveables are daily transferred from one person to another, simply on the faith of the vendor's possession; and one of the most difficult problems which modern legislation has to solve is the reconciliation of the interests of commerce with the prevention of fraudulent transfers of moveables by persons in possession of them. It is, therefore, to be regretted, that the Contract Act is silent on the subject of hypothecation of moveables. We must not, however, infer from

(b) The Contract Act contains no definition of goods in the chapter on pledges. It may be here stated that there may be a contract for a pledge of goods not in existence, (*Story on Bailments*, p. 270), and even at common law there may be a valid mortgage of property of a fluctuating nature, as, for instance, the stock of a tradesman. (*Spence Vol. II*, 776.)

(c) In the French law there can be no hypothecation of moveable property (*Code Civil*, sections 2114, 2120). In this respect it agrees with the laws of most of the Continental States of Europe and of the United States of America and also of Scotland. (*Burge*, Vol. 3, p. 573. *Story on Bailments*, pp. 265, 273.) The same rule obtained under the *Coutume de Paris* and the *Coutumes de Normandy* and still prevails in Jersey and Guernsey. (*Hayley v. Bartlett*, 14 Moore, P. C., 251.) The gage of the French law like the pledge of the English law, requires that the security should be delivered to and remain in the custody of the creditor or of a third person appointed by the parties for the purpose. (*Code Civil*, sections 2074—2076.) An exception, however, is recognized, in favour of maritime hypothecation. According to Sir William Jones, the distinction between pledging and hypothecation was originally Attic, although according to the same authority hardly any part of the Athenian laws on this subject can be gleaned from the ancient orators except what relates to bottomry in some speeches of Demosthenes.—(*Collected Works of Sir William Jones*, Vol. VI, p. 654.) I may mention that on the same page the learned author refers to the peculiar doctrine of the Mahomedan law in regard to the loss of pledges as affecting the rights of the pledgee.

the silence of the Legislature that such transactions are invalid in this country, or that they may not even be enforced against *bond fide* purchasers without notice. In the case of *Deans v. Richardson* (III All. H.C. Rep., 54), the Allahabad High Court affirmed the validity of a mortgage of moveable property, although unaccompanied by delivery of possession. In giving judgment, the Court observed:—“Now, without going at length into the numerous English authorities cited by the learned counsels in the course of their arguments, we may lay it down as the result of the latest rulings, that, by the common law of England, where goods are mortgaged and left in the possession of the original owner, the circumstance that they are so left is not to be held as a fraud ‘*per se*,’ rendering the mortgage liable to be defeated as between the mortgagee and third parties, such as *bond fide* purchasers or judgment-creditors; but when possession is left with the mortgagor, this is a circumstance which warrants the Court in leaving it to the jury to determine whether or not the mortgage was fraudulent and colourable, or otherwise. We are not aware that any difference prevails between the law on this point, which has heretofore been accepted in this country, and the English common law. When recently the proposed Code of Contract Law was discussed in this country, the provision which the Indian Law Commissioners proposed for the security of *bond fide* purchasers of chattels from persons in possession was not only denounced as at variance with the received practice of the Courts, but as undesirable in this country. We do not feel at liberty to hold that the rule which has heretofore been accepted is so inequitable that we are at liberty to disregard it in our judgment. The circumstances of each case should be closely scanned; and, where it is shown that the original dealing is *bond fide*, it should be supported, notwithstanding there has been no delivery. In the present case no fraud other than alleged legal fraud and laches is imputed to the Bank. It is not denied that the advance was made and the security bargained for; it is only urged that the Bank should have taken possession at least when failure occurred in payment of the loan. The Bank was not, in our judgment, bound to take possession immediately after default was made. The machines were the means whereby the debtor earned moneys; and it may, therefore, have been imagined that, in course of time, the debtor would

Cases on
the point.

LECTURE be in a position to discharge his debts if indulgence were
 XI. shown him. The Court, after considering the arguments urged, finds that the property in suit passed to the auction-purchaser, subject to the lien created in favour of the Bank; and a decree will issue accordingly in favour of the Bank."

Distinction
 between
 mortgage
 and pledge.

This doctrine was adhered to in the subsequent case of *Shyam Surder v. Cheytaloll*, and the mortgagee was allowed to enforce his security against a purchaser without notice. (III All. H. C. Rep., 71.) We must not, however, forget that there is considerable danger of fraud in such cases; and in England the legislature has found it necessary to make stringent provisions for the protection of creditors generally in a series of Acts known as the Bills of Sale Acts. It may here be necessary to notice the distinction between a mortgage and a pledge of chattels. A mortgage, although it is subject to a condition, passes the whole title to the creditor, but a pledge passes only what English lawyers call a special property. "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation or the course of trade to be a lien upon them." (*Jones v. Smith*, 2 Ves. Jun., 378. See also *ex-parte* Official Receiver in *re Morrit*, 18 Q. B. D., 222; *Halliday v. Holgate*, L. R., 3 Ex., 302; *Donald v. Suckling*, L. R., 1 Q. B., 594.) The mortgagor of chattels may, therefore, be allowed to retain possession till default, but such a proceeding is open to the same objections as a hypothecation. As a necessary consequence of the distinction between a pledge and a mortgage of chattels, a pledgee is only entitled to an order for sale, while a mortgagee is only entitled, in the absence of any agreement to the contrary, to an order for foreclosure. (*Carter v. Wake*, 4 Ch. D., 605; *ex-parte* Official Receiver in *re Morrit*, 18 Q. B. D., 222.) It is scarcely necessary to state that the pledgor by virtue of his general property may sell all his right in the pledge, and similarly the pledgee may assign his interest in the pawn either absolutely or conditionally by way of pledge to another person (d.) It would not, however, be always safe for him to

(d) The interest of a pledgee in redeemable pledges may be taken in execution. *In re Rollason*, 34 Ch. D., 495; Cf. *Halliday v. Holgate*, L. R., 3 Ex., 299; *Mores v. Conham, Owen*, 123.

do so without a previous demand of his money from the pledgor. (*France v. Clark*, 26 Ch. Div., 830.) It seems that in England the gift of a specific article in pawn is a full gift, and the executor must redeem it. (*Ashburner v. Macguire*, 2 Bro., C. C., 3; *Knight v. Davis*, 3 My. and K., 358; *Bothamby v. Sherson*, L. R., 20 Eq., 304.) A different rule, however, has been laid down by the Legislature in this country. (Sec. 154 of Act X of 1865 extended to the Wills of Hindus, &c., in the Lower Provinces of Bengal, and in the towns of Madras and Bombay by Act XXI of 1870. sec. 2.)

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To return. If the pawnor makes default, the pawnee may sell the pledge of his own authority and without judicial process. Where no time is fixed for redemption, the pledgor must give notice to the pledgor to redeem before he is at liberty to sell. (*Pothonier v. Dawson*, Holt, N. P. Rep., 383.) But he is bound in every case to give previous notice of the sale to the pawnor. If, however, there is any express agreement as to the mode or time of selling, it will ordinarily regulate the rights of the parties. The pawnee may also, at his option, bring an action against the pawnor, and retain the goods pledged to him as collateral security. The lien of the pawnee extends not only to the principal debt, but also to the interest whether ex-contractu or ex-mora, as well as to any necessary outlay in the preservation or custody of the pledge (e). The language of the law, however, leaves us in some uncertainty whether the right of the pawnee to interest and necessary expenses is confined to a bare right of detention, or whether he is entitled to retain the amount out of the proceeds of the pledge. The Legislature could hardly have intended to confer the somewhat precarious right of a bare lien in such cases. But it is unfortunate that it has expressed itself in language which is certainly open to misconstruction.

Right of
sale of
pawnee.

It is hardly necessary to observe that the pawnee may obtain a sale of the pledge through judicial process, and having regard to the jealousy with which a private sale is regarded, and the possibility of further litigation, a sale through the intervention of a Court of Justice would certainly seem to be desirable in all ordinary cases. In

Sale
through
judicial
process.

(e) It has been held in England, that if a person transfers shares in a company, by way of mortgage, and the mortgagee as registered owner becomes liable for calls or other payments he cannot compel his mortgagor to indemnify him, unless he comes to redeem. (*Phene v. Gilman*, 5 Hare, 10.)

LECTURE XI. commercial transactions, however, this is not always either practicable or convenient; but the pawnee, as a fiduciary vendor, is bound to attend to the interests of the pawnor, and an improper sale will certainly be set aside as an abuse of the duty cast upon him. But you must remember that there is not the same danger of fraud in the sale of chattels as there is in the sale of land. Moveables may be appraised with sufficient accuracy for all practical purposes, and compensation in money may always be made, but the case is very different with landed property. Besides, the exigencies of commerce may absolutely require, in many cases, a prompt sale of goods; but I need hardly point out that the analogy cannot be safely extended to land. I have, however, dwelt at length on the subject in a preceding lecture, and if I recur to it, it is only to point out that a power of sale, which may be safely given to a pawnee, may yet be denied to a mortgagee of immoveable property. I ought, perhaps, to add that in most continental systems as well as in Scotch Law, a pledge can only be sold under a decree of Court (Story on Bailments, p. 282.)

Expenses. I omitted to mention that, extraordinary expenses for the preservation of the pledge, expenses which could not have been foreseen, may be recovered by the pawnee from the pawnor; and this, although by some accident they might not ultimately benefit the pawnee (*f*). There is, however, this distinction between expenses of this class and necessary expenses. In the case of necessary expenses, the law authorizes the pawnee to retain the pledge till he is reimbursed; while in the case of extraordinary charges, the pawnee, it is said, has a right of action against the pawnor for the outlay, and it is not stated whether he can add it to the amount of his lien. It is, however, doubtful whether the Legislature really intended to make any such distinction, although the language of the sections might bear such a construction. In the absence of any contract to that effect, the pawnee may not detain the pledge for any other debt than that for which the goods were pawned to him. The right of tacking, however, is recognized to a limited extent, the Court being bound to presume, in the absence of any evidence to the contrary, that subsequent advances made to the pawnor were made on

Tacking.

(*f*) As to expenses not necessary but merely useful, see Story on Bailments, pp. 279—319.

the security of the pledge, and the pawnor is not entitled to redeem, except on condition of repaying the original debt, together with the subsequent advances (*g*). It would seem that this qualified right of tacking may be enforced, not only against the pawnor, but also against creditors and purchasers, no distinction being apparently made by the Act in favour of the latter. The rule of the English and American law on the point is thus stated by Mr. Justice Story in his Equity Jurisprudence, § 1034:—

“A subsequent advance made by a mortgagee or a pledgee of chattels would attach by tacking to the property in favour of such mortgagee, when a like tacking might not be allowed in cases of real estate. Thus, for instance, in the case of a mortgage of real estate, the mortgagee cannot, as we have seen, compel the mortgagor, upon an application to redeem, to pay any debts subsequently contracted by him with, or advances made to him by, the mortgagee, unless such new debts or advances are distinctly agreed to be made upon the security of the mortgaged property. But in the case of a mortgage or pledge of chattels, the general rule, or at least the general presumption, seems the other way. For it has been held, that, in such a case, without any distinct proof of any contract for that purpose, the pledge may be held until the subsequent debt or advance is paid, as well as the original debt. The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff, seeking the assistance of the Court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum, but upon the credit of the pledge which he had in his hands before. The presumption may, indeed, be rebutted by circumstances; but, unless it is rebutted, it will generally, in favour of the lien, stand for verity against the pledgor himself, although not against his creditors or against subsequent purchasers.”

(See *Adams v. Claxton*, 6 Ves., 226; *Demandray v. Metcalf*, 2 Vern., 691; *Vanderzee v. Willis*, 3 Bro., C. C., 21; *Praed v. Gardiner*, 2 Cox, 86. But see *ex-parte Deeze*, 1 Atk., 228.)

English
law on the
point.

But although the right to tack may not be set up against an assignee or a creditor, it seems that where a

(*g*) According to the English law if a pawnee takes a security by specialty as a bond, for instance, for the subsequent debt, it will be presumed that he did not intend to rely on the pledge. (Spence, Vol. II., 773.)

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pledge is made as security for a loan and afterwards the pledgor borrows a further sum for which a third person becomes surety, such third person will, on payment of the second debt, be entitled to have the surplus proceeds of the entire property pledged applied in reduction of the second debt even as against an assignee of the pledgor. (*Praed v. Gardiner*, 2 Cox., 86.)

Use of the
goods.

A pawnee may not ordinarily use the goods pledged to him without the consent of the pawnor; such consent, however, will be presumed, if the pledge is such that it cannot be duly preserved without being used. A horse, for instance, must be exercised, and the pawnee may ride it for that purpose. If, however, the pledge is of such a nature, that it will be the worse for use, as wearing apparel, for instance, the pawnee may not use it himself. If the use is indifferent, a moderate use is perhaps not prohibited but in no case should the pledge be exposed to extraordinary peril. In *Coggs v. Bernard* (2 Raymond, 909) Lord Holt says:—"If the pawn be such as it will be worse for using, the pawnee cannot use it, as clothes, &c. But, if it be such as will never be worse, as if jewels for the purpose were pawned to a lady, she might use them. But, then, she must do it at her own peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet is broken and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such, is not liable to be used." (But see Jones on Bailments, 81; Buller's *Nisi Prius*, 72; Story on Bailments, 296—298).

It has been said that where the pawn is used, as if a cow is milked and a profit arises therefrom, the pawnee shall account for the profits after deducting all expenses for the keeping (Story on Bailments, 298). But the principle of this rule, which is said to carry with it 'a most persuasive equity,' would apply equally to other cases, where the pledge is used by the pawnee himself, except where the pledge will deteriorate unless it is used.

The Con-
tract Act.

On this subject the Contract Act says:—"If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them." (Section 154.) But the foregoing rules which have been adopted in other

systems of law may be taken to illustrate sufficiently the conditions under which a pledge may or may not be used by the pawnee.

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I will next call your attention to the degree of diligence imposed by the law on the pawnee. Section 151 says:—
“In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.” This is a very simple rule unincumbered by the somewhat refined, if not fanciful, distinctions which we find in the Roman and English law. (See the whole subject discussed in Story on Bailments, pp. 298—306.) It is, however, necessary to observe, that the responsibility of the pawnee is greatly increased when he is in “mora,” i.e., when he wrongfully withholds the pledge from the pawnor. He then becomes answerable for any loss, destruction or deterioration from the time of such refusal. (Section 161.)

Diligence
of the
pawnee.

Another duty of the pawnee is to render an account of the profits and advantages derived by him from the pledge in cases where there is either an agreement to that effect between the parties, or where it may be inferred from the very nature of the pledge. Thus, if cattle are pledged, the profits of their labour must be accounted for; so also, where the subject of the pledge is a ferry boat, for instance, which the parties intend to be employed in the carriage of passengers, the pledgee must account for the profits. (Story on Bailments, pp. 309-310). It is hardly necessary to add that the foregoing observations do not apply where the profits are agreed to be taken in lieu of interest, or an account is otherwise excluded by the agreement of the parties.

I told you in a previous lecture that, as a rule, any accession to the pledge, or natural increase, is considered to be itself pledged. A different rule might perhaps at first sight seem to be laid down in the Contract Act, Section 163 of which says:—“In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.” It is, however, probable that all that the Legislature intended to enact was, that the property, in the accession or increase, should belong to the pawnor and not to the pawnee, although

Accession
to the
pledge.

LECTURE the latter might claim the same qualified right in the
 XI. increase as in the original pledge. I need hardly say that,
 — in the absence of any authority, I cannot but speak with
 some reserve.

Redemp-
 tion.

The pawnor may redeem the pledge at any time before it is actually sold, provided that he asserts his claim within thirty years from the date of the pawn, or of a written acknowledgment by the pawnee. (Act XV of 1877, Sch. 2, Art. 145) (*h*). Any agreement by which the right of redemption was sought to be fettered, would, as in the case of a mortgage of land, be absolutely void; and the pawnor would be let in to redeem, notwithstanding the agreement. If the pawnee should die before redemption, the right may be enforced against his representatives, and conversely the right to redeem is not confined to the pawnor during his life, but may be asserted by his legal representatives.

Possessory
 liens.

I shall conclude this lecture with a few words on possessory liens—a very imperfect class of securities when confined to a bare right of detention without the means of obtaining material satisfaction. The Contract Act, following the English law on the subject, divides liens into two classes—general and special. A special lien authorizes the holder of the goods to retain them only till the particular debt in respect of the goods is paid. But a general lien extends to any balance which may be due from the owner to the holder of the goods. By section 93 of the Contract Act, the seller has a lien on the goods sold by him for the unpaid price so long as they remain in his possession. As in the case of land, however, the lien may be waived, and the taking of a collateral security will probably raise the inference that the lien was intended to be abandoned. I need hardly point out that, where the goods are sold on credit, the seller has ordinarily no lien; but the insolvency of the buyer before delivery will give the seller the right to retain the goods. The same result follows if the period for which credit is given is allowed to expire, and the goods are suffered to remain in the possession of the seller. (Sections 95—97. As for the right of stoppage *in transitu*, see sections 99—106.)

(*h*) It is to be noticed that the period begins to run from the date of the pledge and not from the time when the pledgor is entitled to redeem. In England, it seems that if no time is fixed for the redemption, the pledgor having his whole life to redeem, time will not begin to run during his life. (*Kemp v. Westbrook*, 1 Ves., S. 278.)

According to the English law, as I have already explained, a possessory lien is only of value as a means of compelling satisfaction. It does not, as a rule, confer a right of sale, nor is it assignable. (*Thames Iron Works Co. v. Patent Derrick Co.*, 29 L. J., Chan., 714.) Even if the possession of the goods is attended with expense, a person having a bare lien may not sell them in discharge of his debt. (*Mulliner v. Florence*, 3 Q. B. D., 484; on the unsatisfactory condition of the English law on the subject, see Pollock's Essays, pp. 68-69.) Section 107 of the Contract Act, however, contains an important improvement. It says:—"Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale."

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law on the
point.

There are other descriptions of liens, however, which are not accompanied by a power of sale. The lien, for instance, allowed to a person for labour bestowed on goods bailed to him is confined to a bare right of detention. Bankers, factors, attorneys, and others who possess a general lien, are also in the same position. (Sections 170 and 171.) They can, no doubt, put a pressure on the will of the debtor, but they may not, in any case, sell the pledge.

Other
kinds of
liens.

For instance, if I give a rough diamond to a jeweller to cut and polish, and the work is accordingly done, the jeweller may retain the stone as long as his services are not paid for. But he cannot sell it even after notice, and pay himself out of the proceeds.

Artificer's
lien.

Section 171 of the Contract Act would seem at first sight to limit the lien of an attorney only to goods bailed to him, but that is not so; as we have already seen that a more extensive lien is recognized in his favour, but the lien which attaches to the fruits of a judgment or decree is not a possessory lien, and is not therefore dealt with in the chapter on bailments.

Attorney's
lien.

The validity of a pledge in certain cases by a person in possession although not the owner is recognized by the Indian Contract Act, Section 178 of which says:—"A person who is in possession of any goods or of any bill-of-lading, dock warrant, warehouse keeper's certificate, wharfingers

The Con-
tract Act.

LECTURE XI. certificates, or warrant, or order for delivery, or any other document of title or goods, may make a valid pledge of such goods or documents, provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly :

Provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them by means of an offence or fraud."

The Factor's Act.

This section is modelled on the Factor's Act, 5 and 6 Vict., Cap. 39, and is an exception to the general rule that no person can give a better title to another than he himself has, and is founded on the principle that as between two innocent parties the loss ought to fall on him, who, by his carelessness, has put another in a position to commit a fraud. But it is necessary that the pawnee should act in good faith, but mere suspicion is not enough, and the question of *bona fides* is always a question of fact, or as English lawyers say, a question for the jury. (*Gobind v. Ryan*, IX Moore Ind. App., 140.) The second proviso again shows that, if the goods or documents have been obtained by means of fraud, no title whatever would pass to the pawnee (*Kartick v. Gopal Kishor*, I. L. R., III Calc., 264). It may be observed that the section is intended only to meet the case of an agent entrusted with goods, and that the bare custody of a servant, the goods being in the eye of law in the possession of the master, would not be sufficient to pass any rights to the pawnee. (*Mahomed Elai Buksh v. Brojo Kishen Sen*, I. L. R., IV Calc., 497; *Kartick Churn Setty v. Gopal Kristo Paulit*, I. L. R., III Calc., 264; *Lekraj v. Mahatabchand*, X Ben. L. Rep., 35, P. C. As to pledge of Government notes by an agent with power to negotiate, see *Raj Chunder Chatterjee v. Madhoosoodan Mookerjee*, I. L. R., VIII Calc., 394. Cf. *Jonmejoy v. Watson*, I. L. R., X Calc., 901.)

The cases I have just discussed constitute an exception to the general rule that no person can convey to another a higher title than that possessed by himself. Where, therefore, a person pledges goods in which he has only a limited interest, as, for instance, an interest for life, the pledge will be valid only to the extent of such interest. (Section 179; cf. *Hoare v. Parker*, 2 T. R., 376.) I ought to mention that, according to the English law, where

two or more joint-owners make a pledge, the goods cannot be redeemed except with the consent of all the joint-owners. A refusal by the pledgee, therefore, to restore the goods to one of them only will not be such a conversion as to entitle the plaintiff to maintain an action of trover against the pledgee. (*Harper v. Godsell*, 5 L. R., Q. B., 422).

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It has been pointed out that the protection which is conferred by the Contract Act on *bond fide* purchasers is not apparently extended to *bond fide* pledgees, there being no section in the Act corresponding to the second exception to section 108 (*Shephard and Cunningham's Contract Act*, p. 395).

Questions of considerable nicety occasionally arise as regards the measure of damages where a third person or the pledgee himself under colour of his interest is guilty of any wrongful act in respect of the pledge. A few observations on this topic will not, therefore, I trust, be wholly out of place. The right of the pledgee to bring an action against a stranger for the wrongful deprivation of the use or possession of the pledge has not, so far as I am aware, been ever questioned. But it seems to have been doubtful whether the pledgee was entitled to recover the full value of the pledge or only damages to the extent of his lien (*Story on Bailments*, pp. 314—315). The doubt has been set at rest by the Indian Contract Act. As against a stranger, the pawnee is entitled to recover the full value of the pledge, the amount received as compensation being divisible between the pawnee and the pawnor according to their several interests (sections 180, 181). The Act, however, lays down no measure for assessing the damages as between pledgor and pledgee, where there is merely an irregular exercise of his power by the pledgee, as, for instance, a premature sale. The English law on the subject is in a somewhat tangled state, but the better opinion seems to be that the owner must show that he has been really damnified (see the cases cited in *Pollock's Torts*, p. 296. See also the subject discussed in *Benjamin on Sales*, pp., 772—780). But an unauthorized sale by a person with a bare possessory lien stands upon a different footing. By parting with the possession, he loses his right, and his act being merely wrongful, he will be answerable for the full value of the property. (*Mulliner v. Florence*, 3 Q. B. D., 484.) The question in such cases is, was the act of the bailee entirely inconsistent

Measure of
damages in
trover.

LECTURE with the terms of the bailment? As I have already stated, XI. the English law on the subject with its manifold distinctions is in a scarcely satisfactory state, and when any such question arises in this country, it will probably be decided on general principles which would be simpler and more equitable in their application.

In conclusion, I will deal with the various methods in which the contract of pledge may be extinguished, a result which may arise in various ways. The discharge of the engagement for which the pledge was given will, of course, put an end to the rights of the pledgee. The taking of a higher or a different security without any agreement that the pledge shall continue may also be followed by the same result. The question is, however, one of intention, and a mere change in the nature of the security will not be conclusive on the point. It must be borne in mind that, as the pledge is only an accessory to the debt, if the debt itself is extinguished, the right to the pledge will also be lost. This will not, however, be the case where the debt is not extinguished, but only the right to recover it by action is barred by reason of the operation of the statute of limitations or otherwise. In such cases the creditor may retain the pledge in order to put a pressure on the debtor, or he may convert it into money, and thus satisfy the debt (*Distinguish Vitla v. Klekra*, I. L. R., XI Mad., 153, where the pledgee sought to sell the security under a decree of Court). It is scarcely necessary to state that the right of the pledgee will be destroyed by any act which amounts to a release or waiver of the pledge.

Extinction of pledge.

Transmutation of pledge.

In conclusion, it is necessary to state that, although the right to the pledge will manifestly be extinguished when the thing itself is destroyed, a mere transmutation, if the property itself can be traced, will not have the effect of putting an end to the pledge (*Taylor v. Palmer*, 3 M. & S., 562.) In some systems of law a distinction is made where there has been a permanent and essential transmutation as it is called. But the distinction is not a very satisfactory one and seems to savour of that overmuch refinement, with which lawyers, whether with or without just cause, are so often reproached.

LECTURE XII.

Extinction of securities—Consolidation—Merger of debt—Right of prior mortgagee how far extinguished—Rule of Roman law—Doctrine of English Court of Chancery—Conflicting decisions in India—Extinction of security by discharge of obligation—Novation—Substitutionary and cumulative—Extinction of security by destruction or sale of pledge or prescription and renunciation—Priority—Generally determined by order of time—How affected by registration—Notice immaterial—Priority how far affected by possession—Rule of Hindu law—Privileged liens—Salvor's lien—Tacking—Extent to which recognised in Roman law—Doctrine of English law—Origin of doctrine—Not followed in India—Consolidation of securities—Rule of English law—Partial recognition by our Courts—Mortgage to secure future advances—How priority is forfeited—Fraud, actual or constructive, of mortgagee—Laches—Effect of allowing title-deeds to remain in custody of mortgagor—Allowing mortgagor to receive rents after notice of incumbrance—Deeds of further charge—Practice in India—Waiver of security not presumed—*Lis pendens*—Application of doctrine in relation to priority of securities.

I PROPOSE to discuss in the present Lecture the various methods by which a security is extinguished. I will also treat of the rules governing the priority of securities, and as intimately connected with the topic, the 'tacking' and 'consolidation' of mortgages. The questions to which I intend to call your attention are extremely important, and deserve very careful attention. I must, however, warn you at the outset that much of this branch of the law of securities is still in a floating condition; and I am, therefore, obliged to speak with some reserve.

A mortgage is, generally speaking, extinguished by consolidation, that is, by the property in the pledge vesting in the mortgagee, or by the acquisition by the mortgagor of the rights of the mortgagee. In such case, there is, technically speaking, a complete confusion of the security. The doctrine rests upon the supposed impossibility of a man having a right of pledge over his own property, and is analogous to the principle by which a servitude is extinguished when the dominant and servient tenement become vested

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English
law.

in one and the same person (a). A very slight examination of the rule will, however, show that the doctrine must be received with some qualification, as cases may be easily put, in which the application of the rule would lead to manifest injustice, where, for instance, there are intervening estates. Thus, supposing the equity of redemption is purchased by the prior mortgagee, if the effect of the purchase were to extinguish the security, the result would be that the subsequent incumbrancers would be entitled to priority, and the prior mortgagee would thus be in a distinctly less favourable position than he occupied before. In such cases, the Roman law admitted an exception and recognised the right of the prior mortgagee to use his mortgage as a shield against the claims of the puisne incumbrancers. It has indeed been suggested by some writers that the exception applied only to those cases in which the pledgee was either ignorant of his own right of pledge or of the subsequent incumbrances; but the better opinion seems to be that the exception was not hedged in by any such limitations. (See the authorities cited in *Ramu Naikun v. Subarayn Mudali*, VII Mad. H. C. Rep., 229; and the Supplement to Markby's Elements of Law, p. 43.)

A different doctrine, however, prevails in the English law; (b) and the purchaser of an equity of redemption, with

(a) There is, however, no real incongruity where there is an intervening estate. See the observations of West, J., in *Mulchand v. Lalnu*, (I. L. R., VI Bom., 412-413.) The principle of merger founded on the maxim, *Omne majus continet in se minus* may be thus stated:—"Whenever a greater estate and a less coincide and meet in one and the same person, *without any intermediate estate*, the less is immediately annihilated, or in the law phrase, is said to be merged, that is, sunk or drowned, in the greater." But in equity merger may take effect notwithstanding the separation of the estates by an intervening interest (*Lewin on Trusts*, p. 726.)

(b) I ought, perhaps, to use the past tense, for the case of *Toulmin v. Steere* has been overlaid with so many qualifications and deductions that "it retains little or none of its original properties as a guide in such questions as may arise of a kindred nature." (See *Gregg v. Arrot*, Lloyd and Goold's Rep., temp. Sugden, 246-251; *Watts v. Symes*, 1 DeG. M. and G., 240, 244; *Walcott v. Condon*, 3 Ir. Chan. Rep., 1-13; *Parry v. Wright*, 1 Sim. and St., 369, affirmed on appeal, 5 Russ., 142; *Garnett v. Armstrong*, 4 Dru. and War., 182; *Hayden v. Kirkpatrick*, 34 Beav., 645; *Unthank v. Gabbett*, Beatty, 453; *Anderson v. Pignet*, Law Rep., 8 Ch., 180, 187; *Stevens v. Mid-Hants Ry. Co.*, Law Rep., 8 Ch., 1064; *Adams v. Angell*, 5 Ch. D., 634.)

On the other hand, *Toulmin v. Steere* seems to have been recognised as law in *Squire v. Fford*, 4 D. and War., 198; *Armstrong v. Garnett*, 9 Hare, 60; *Otter v. Lord Vaux*, 6 D. M. and G., 643. It seems that the rule is not peculiar to the English law. See *Wilkinson v. Simson*, II Moore, P.C., 275, a case under the Dutch law.

notice of subsequent incumbrances, stands, in England, in the same situation as if he himself had been the mortgagor, and cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in (*Toulmin v. Steere*, 3 Mer., 210.) The prior mortgagee, however, may protect himself from the consequences of a merger of the debt by taking distinct steps to keep his security alive. If, however, the mortgage is not kept on foot as a distinct and distinguishable security, there will be complete confusion, and the mortgagee may not use it as a shield to protect himself from the claims of the puisne incumbrancers. (*Watts v. Symes*, 21 L. J. Chan., 713; *Heyden v. Kirkpatrick*, 34 Beav., 645.)

The rule of the English law on the point will perhaps seem to most persons extremely artificial, and, on the whole, less equitable than the doctrine of the Roman law. Indeed, English lawyers themselves would seem to share the impression, and the doctrine laid down in *Toulmin v. Steere* has been sought to be qualified in more recent cases. (See the cases cited in foot-note (b).) It is, therefore, somewhat remarkable that the doctrine should have been adopted at one time without question by some of the superior Courts in India. (*Gournarain v. Brojonath*, XIV Suth. W. R., 491; *Itcharam Dyaram v. Raiji Joga*, XI Bom. H. C. Rep., 41.) In this country where the art of conveyancing is in a rudimentary state, cases ought to be decided on principles of substantial justice untrammelled by the refinements and subtleties, which have been developed by the ingenuity of English conveyancers, and which only too often reflect the logic of the schools, together with that love of form which is attributed to lawyers sometimes as a distinction but more frequently as a reproach.

Lawyers, as a noble lord recently said, are not without their superstitions, and it will perhaps strike most persons not brought up in the chambers of an English conveyancer that the principle of merger as applied in some well known cases represents the theological rather than the positive stage of law. Indeed, the whole controversy on the subject is sensibly tinged with the strong sediment of realism which is still traceable in some portions of the English law. I do not wish to say anything which may wear the appearance of presumption or disrespect, but I trust I

Toulmin
v.
Steere.

LECTURE XII. — may be permitted to suggest without offence that the very high estimate which English lawyers almost always set on their own system is scarcely justified by a comparison with other systems of law, and more particularly Roman law (c).

Madras
case.

In the case of *Ramu v. Subarayn* (VII Mad. H. C. Rep., 229), the Madras Court, after comparing the doctrine of the Roman law with that of the English law on the point under consideration, refused to follow the English authorities, the learned Judges observing that the "rule of the civil law is the true rule, and one to which the minds of English Judges are gradually tending." (Compare *Narain Saha v. Ochut Saha*, XIV Suth. W. R., 233; *Sunid Wajed Hossein v. Hafez Ahmed Reza*, XVII Suth. W. R., 480.)

Gokool
v.
Pooran.

The matter has, however, now been set at rest by the judgment of their Lordships of the Privy Council in the case of *Gokool Das v. Pooran Mal*, in which it was held that where the mortgagor's right, title and interest were sold subject to a first and a second mortgage and the purchaser afterwards paid off the first mortgage, the latter security was not extinguished. In other words, where a property is subject to a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is not necessary to have the mortgage assigned to a trustee in order to get the benefit of it. A formal transfer is not essential for the purpose of keeping the mortgage alive, nor even the formal expression of an intention to do so. Their Lordships, in the course of their judgment, say:—"The doctrine of *Toulmin v. Steere* (3 Mer. 210) is not applicable to Indian transaction, except as the law of justice, equity, and good conscience. And if it rested on any broad, intelligible principle of justice, it might properly be so applied. But it rests on no such principle. If it did, it could not be excluded or defeated by declaration of intention or formal devices of conveyances, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as

(c) As pointed out by Dr. Pollock, the merits of those who administer the English law do much to hide its real defects. The excellence of the workmen prevents us from seeing how faulty their tools are. (Pollock's Essays, p. 65.)

against intermediate mortgagees to whom he is not personally liable.

"In India the art of conveyancing has been, and is, of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere*, seems to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

"The obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is, that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interest in the property is by way of life estate and remainder, or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid." (I. L. R., X Cal., 1045—46. See also *Lachmin Narain v. Koteskar Nath*, I. L. R., II All., 826; *Gaya Prasad v. Salik Prasad*, I. L. R., III All., 682; *Ali Hasan v. Dhirja*, I. L. R., IV All., 518; *Gangadhara v. Siva Rama*, I. L. R., VIII Mad., 246; overruling—*Krishna Reddi v. Muttu Narayana*, I. L. R., VII Mad., 127; *Mulchand Kuber v. Lallu Trikam*, I. L. R., VI Bom., 404; *Shantapa v. Balapa*, I. L. R., VI Bom., 561; *Gopal Sahoo v. Gunga Pershad*, I. L. R., VIII Cal., 530; *Hira Chand v. Bhaskar*, II Bom. H. C. Rep., a. c. j., 198; *Sirbadk Rai v. Raghu Nath Prasad*, I. L. R., VII All., 568; *Janki Prasad v. Srimatra Mautangini*, I. L. R., VII All., 577; *Nilo Pandurang v. Rama*, I. L. R., IX Bom., 35; *Duli Chand v. Monohur*, II Cal. L. Rep., 18; *Bissen Doss v. Sheo Prasad*, V Cal. L. Rep., 29; *Gunga Narain v. Hurish Chunder*, VI Cal. L. Rep., 336.)

It is perhaps somewhat unfortunate that the question of intention should be introduced into such cases, as it is

Question of
intention.

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Intention.

likely to lead to undue refinement (*d*). It cannot be denied that where there is an intervening interest, the person making the payment can have but one intention, which is that the intervening interest shall not acquire priority to the prejudice of his own rights. It would, indeed, be a most extraordinary thing to suppose that the person who buys the equity of redemption or pays off an earlier mortgage, could have any other object than to keep the charge alive against intermediate incumbrancers. (See the observations of Jessel, M. R., *Adams v. Angell*, 5 Ch. D., 645.) There can, therefore, be, on principle, no merger in such cases; a more flexible rule, which would let in the question of intention, might lead to results, which could scarcely have been in the contemplation of the parties. (S. A. No. 1865 of 1887, *Dyal v. Sukharam*; S. A. No. 1685 of 1887, *Hari v. Monmohini*.) The rule laid down in some English cases is that in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested (Lewin on Trusts, p. 726). To the principle thus stated, there can be no grave objection, except, perhaps, that it will have no operation at all in such cases, as it cannot surely be for the benefit of any person that he should forfeit his rights, and express intention is, of course, out of the question.

Mohesh v. Mohunt.

The case of Gokool Das must, however, be distinguished from another case, which was also heard by the Privy Council and with which it is liable to be confounded. The question, however, in that case was one not of merger, properly speaking, but of the right of a mortgagee whose security eventually turned out to be worthless, to avail himself of an earlier mortgage which had been paid off with his money; in other words, the question was one of subrogation. In the case to which I refer a person who had put himself forward as the owner of a certain estate

(*d*) It has, however, been held that very slight evidence will be sufficient to show an intention to keep the mortgage on foot, as, for instance, the retention of the mortgage-deed by the mortgagee. (*Shantapa v. Balapa*, I. L. R., VI Bom., 561; *Goluknath v. Lalla Premia*, I. L. R., III Cal., 307.) But where certain persons borrowed money on mortgage and paid off a prior charge with the money thus raised, it was held that, in the absence of any assignment or intention to keep the first mortgage on foot, the second mortgagee was not entitled to the benefit of the prior security, although the mortgagors got back the bond from the first mortgagee and made it over to the second mortgagee. (*Apaji v. Kavoji*, I. L. R., VI Bom., 64.)

and who was dealt with as such, borrowed money on a mortgage, and with the money thus raised paid off an incumbrance by which the property was admittedly bound. There was no expression of any intention to keep the charge alive, and as the mortgagor claimed to be the owner of the estate in fee simple, their Lordships applied the well-known rule of equity, and held that the charge was extinguished, although the result would have been different, if the mortgagor had, instead of claiming the fee, claimed only to be tenant for life, in which case the presumption would have been that he intended to retain the benefit of the mortgage against the inheritance of which the mortgagee might have been entitled to avail himself. The case might seem at first sight to be rather a hard one, but we must remember, as their Lordships say, that neither law nor equity, and equity is only another name for law, can give a person an additional security, because the security relied upon by him turns out to be bad. (*Mohesh Lal v. Mohunt Bawan Das*, I. L. R., IX Cal., 961.) (e)

It must not, however, be supposed that in every case where a person pays off a charge in the mistaken belief that he is the absolute owner of the property, the charge will be merged. Thus, where a tenant in tail paid off a charge on the estate believing himself to be tenant in fee simple, this assumption forming the basis of the transaction, the Court was of opinion on the ground of mistake that the charge was not merged, although the payment was made with the intention of extinguishing it. (*Earl of Buckinghamshire v. Hobart*, 3 Sw., 186; *Kirkham v. Smith*, 1 Ves., 258; *Nilo v. Rama*, I. L. R., IX. Bom., 35; *Poran v. Harsaran*, 8 Ben. L. Rep., App., 55.)

The case of *Mohesh Lal* again must be distinguished from those cases in which a substituted security is given by the apparent owner of the property to the mortgagee who has already got a valid incumbrance on it. In the case of *Madhabananda v. Ganesh Prasad* (I Suth. W. R., 91), in which this question was raised, the Calcutta High Court was of opinion that where a person in possession as apparent owner, renewed a security originally given by the rightful

(e) Their Lordships referred to the circumstance that the rate of interest was not the same in the two mortgages. They also pointed out that the fact that the money was paid by the mortgagee, who took possession of and subsequently kept the earlier mortgage-deed, could not be regarded as evidence of an intention to keep the latter alive, because the mortgagee acted in the transaction as the banker of the mortgagor.

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 owner, the charge was not extinguished. Indeed, the Court seems to have thought that the substituted security

was perfectly valid, but this proposition is based not so much upon general principles as upon the peculiar facts of the case. In giving judgment Morgan, J., observed :—
 “The plaintiff, no doubt, immediately claims under the mortgage made to him by Munnoo. But that mortgage is found by the Courts to be in substance a continuation of the first mortgage or conditional sale made by Sunnoo. It appears to us that the plaintiff’s mortgage is substantially, if not to its full extent, at least to the extent of the advance made to Sunnoo and the interest due by him (see S. D. R., 1856, p. 942 ; 1857, p. 1184), in the same position as if the mortgage had really been executed by Sunnoo. The position of the plaintiff is not merely that of a person who derives his title from one who (although the apparent owner of the property and in possession of it) is subsequently ascertained to have no title whatsoever, save under a fabricated document. The plaintiff has, in good faith, advanced money to discharge a debt originally contracted by the undoubted owner of the property : his present mortgage security is, either wholly or in part, a substitution for the original mortgage which was undoubtedly a valid one : he has made this advance not to a stranger, but to one who produced an apparently valid will, who has also obtained a certificate of the Court whereby he was authorised to collect the debts of the deceased, and who was actually in possession of the property. Moreover, this person Munnoo was, as we have already stated, the nephew of the deceased, and, as it appears, he and his minor brothers were the heirs of the deceased. In this position Munnoo executes the mortgage, and thereby discharges the estate (which belonged, if not to him as devisee, at least to himself and his brothers as heirs) from the previous incumbrances. It seems to us that, under these circumstances, the plaintiff had a valid title as mortgagee, and having foreclosed that mortgage, he is now entitled to sue for possession.”

Mortgagor
 buying an
 incum-
 brance.

I may mention that the observations which I have just made with regard to the doctrine of merger apply only to the case of a mortgagee purchasing the equity of redemption, or a purchaser of the mortgaged estate who is not under a covenant to pay, discharging an incumbrance on it. They have no application whatever to the case of a mortgagor

himself buying in an incumbrance. If the mortgagor obtains the benefit of a prior mortgage by an assignment of the security, or by purchase from the mortgagee under his power of sale, the charge is absolutely extinguished, and may not be set up against the puisne incumbrancers. (See the English case of *Otter v. Lord Vaux*, 2 K. & J., 650.) The distinction rests upon a very intelligible ground, which I had occasion to explain in a previous lecture. (See Lecture X.) A mortgage is only a security for a debt, and the mortgagor cannot be heard to complain of any increased facilities which may be offered to the subsequent incumbrancers for the recovery of their debts by an enlargement of the estate possessed by the mortgagor. A mortgagor cannot protect himself against his own incumbrances.

In connection with this topic, I may refer to the case of *Frazer v. Jones* (17 L. J. Ch., 353), where the Court was called upon to determine a question of priority between two equitable incumbrancers under very peculiar circumstances. It appears that the mortgagor in mortgaging his equity of redemption falsely recited that a certain deed was deposited with a third party as security for a debt charged on the same property. The mortgagor, however, did afterwards actually deposit the deed with such person as security for monies which were partly due before the mortgage. But the Court was notwithstanding of opinion that the deposit was not entitled to claim priority over the mortgagee (*f*). If, it was said, the recital had been true and the mortgagor had afterwards paid off the debt, or the security had been otherwise extinguished, the mortgagee would have been entitled to the benefit of such payment or extinction; and the claim of the mortgagee to priority could not be defeated by the subsequent deposit of the deeds. (See also *Hughes v. Williams*, 1 DeG. M. & G., 690; cf. *Newton v. Beck*, 3 H. & N., 220.) This is an extension of the principle of *Otter v. Vaux*, but in the absence of any reported case on the point, I cannot say whether it will be accepted by the Courts in India.

To return. The second method by which a security comes to an end is by the discharge of the debt for which the security was given. The obligation may be discharged,

Discharge
of obligation.

(*f*) As a rule, however, a second mortgagee without notice of the first mortgage is not bound to deliver the title-deeds to the latter. (Story's Equity, § 707.) But the practice has been departed from since the passing of the Judicature Act and the consequent fusion of law and equity.

LECTURE XII. not only by an actual payment, but also by what is called novation, that is, the substitution of another obligation in place of the first. The substitution, however, may take place without destroying the former obligation when the novation is known as 'cumulative.' The rule of law, however, is, that in the absence of a clear expression of the intention of the parties to the contrary, the former security is not extinguished. The ordinary presumption in all such cases is, that the benefit of a security is not waived by the acceptance of another security in its place. (See Colq. Rom. Law, § 1852—1855; Fisher on Mortgage pp., 811 & 812; and *Gopeebundhee v. Kalipodo*, XXIII Suth. W. R., 338. Distinguish *Badri v. Daulat*, I. L. R., III All., 706.)

Destruction of the pledge. The pledgee also loses his right by renunciation, or by destruction of the pledge but not, as I have already pointed out, by a mere transmutation. The same result follows, if a third person has held the property for a period sufficient to create a prescriptive right. I may mention that a sale for arrears of revenue or any other statutory sale, which passes the property to the purchaser free of all incumbrances, does not, in reality, destroy the security of the mortgagee. It only transfers the charge from the land to the purchase-money.

Sale by pledgee. In conclusion, it is necessary to observe that a sale by the pledgee, himself passes the property to the purchaser unincumbered by the security(g). The result is the same whether the property is sold under a decree for sale or by the mortgagee himself under his power; and, notwithstanding some conflict the better opinion seems to be, that the benefit of the security passes to the purchaser even when the decree is simply for money, and does not expressly authorise a sale of the mortgaged estate. (See Lecture IV.) A mortgagee may not, in any case, sell the bare equity of redemption. A different rule might be productive of great hardship to the mortgagor; indeed, it might be attended by the most disastrous results to him. Take, for instance, the case of a property worth Rs. 4,000, subject to a mortgage for one-half of that sum. If the mortgagee

(g) In *Bhup Sing v. Zain-ul-Abāin* (I. L. R., IX All., 205), the Court held that a joint incumbrance was extinguished by reason of the purchase of the mortgaged premises by one of the joint incumbrancers, under a decree on a subsequent mortgage, created exclusively in favor of such incumbrancer.

were allowed to sell the equity of redemption, which, by the hypothesis, is worth Rs. 2,000, the price which would be paid by the purchaser would, no doubt, satisfy the mortgage-debt, but the property would pass away from the mortgagor for only Rs. 2,000. It is possible that the mortgagor may become entitled by subrogation to the security possessed by the creditor; but, as I pointed out in a previous lecture, such a course would certainly lead to a perfect waste of litigation, which may be easily avoided by holding that whenever the mortgagee sells the property on which his debt is secured, what he sells is not an undefined right like the equity of redemption, but the pledge itself unincumbered by his own security.

I will now proceed to discuss the rules touching priority, one of the most intricate topics in the law of securities. Now, the general rule is, that priority is determined by the order of time^(h). There are, however, exceptions to this

(h) The rule, however, as observed by Vice-Chancellor Bacon, however convenient when it can be applied, may not be safely followed in complicated cases. Priority is pre-eminently a matter of circumstances, and, except in cases of a very simple character, cannot be reduced to a set of rigid canons. In India, however, there being no distinction between legal and equitable estates, we are free from some of the complications with which the English law is overlaid. I speak with diffidence, but it seems to me that the rule which regulates priority between equitable titles in England might safely be adopted by our Courts. According to that rule, priority in order of time regulates the rights of the parties where the equities are in all other respects equal. (*Rice v. Rice*, 2 Drew., 73.) A conveyance of an equitable interest is always an innocent conveyance; and cannot pass a greater interest than that possessed by the grantor. Equitable incumbrancers, therefore, take according to the date of their securities, and it follows that he who has a prior has a better and superior equity (*Phillips v. Phillips*, 4 D. F. & J., 208). But this rule, it ought to be added, does not hold good where there is a competition between a legal and an equitable title, when priority is regulated by a somewhat different and more artificial principle. In this connection I may mention the distinction between an equitable charge and a personal equity, although only a very fine line divides the one from the other. An equitable right merely creates a personal obligation, and is distinguishable from a right attaching itself to the land or to the substance of the thing which forms the subject-matter of the transaction. Thus, suppose a person represents himself to be the owner of a property which does not really belong to him, and borrows money on the security of it; in this case, although there may be a personal equity enforceable against the borrower, there is no effectual charge on the property, and supposing the borrower afterwards acquires the ownership, the creditor cannot follow the property in the hands of a person to whom it is afterwards transferred for value either absolutely or by way of mortgage and without notice of the prior transaction. (See the judgment of Bacon, V. C., in *Keat v. Phillips*, 18 Ch. D., 560; which gives in a relatively small compass a clear and instructive view of the law on the subject. Cf. *Cave v. Cave*, 15 Ch. D., 639, and cases cited therein.)

LECTURE rule either created by statute or recognised by the Courts
 XII. as founded upon those general principles of justice and equity which, in the absence of any express enactment, our judges are bound to administer.

Registration Act. The first exception is that contained in Section 50 of the Registration Act, which, under certain circumstances, allows a registered mortgage priority over an earlier unregistered security. That section says:—"Every document of the kinds mentioned in clauses (1) and (2) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." A similar enactment was contained in the earlier Acts.

Omission in the former Acts. You will observe one rather remarkable omission in the earlier Registration Acts. They allowed preference to a registered instrument over an unregistered writing, where both belonged to that group of instruments, the registration of which was optional. If, therefore, the puisne incumbrance was one which the parties were bound to register, it would not have been entitled to priority over an earlier unregistered security. (*Hamed Buksh v. Bindabun*, II All. H. C. Rep., 37; *Shaik Ryesatulla v. Durga Churn Pal*, XXIV Suth. W. R., 21.) This defect has, however, now been remedied. A distinction has also been made in favor of parol mortgages when they are accompanied by possession.

I ought to mention that if two deeds are executed on the same day, the Court will enquire which of them was executed first; but if there is anything in the deeds themselves to show an intention, either that they shall take effect *pari passu*, or that one should take effect in priority to the other, the Court will presume that they are executed in such order as to give effect to the manifest intention of the parties. (*Gartside v. Silkstone, &c., Company*, 21 Ch. D., 762.)

Questions of considerable nicety arise when, as it may sometimes happen, an incumbrancer, although entitled to priority over one of earlier date, enjoys no such preference over another who is postponed to such incumbrancer. Thus, suppose, the securities are dated in the order A. B. C., B. having priority over A., and C. over B., but not over A. "Here if the fund available be not more than B.'s security will exhaust, it will be paid first to C. to the extent of the debt for which he has priority over B., and the balance to B. But it seems that if the fund be more than enough for B., all further sums received by C. will be for the benefit of A. In a case in Ireland, where, by force of registration, a deed gained priority over one of earlier date, it was held that the former could not shake off intermediate judgments of earlier date than itself, but carried them up, as was said, 'upon its back.'" (Fisher's Mortgage, p. 582.)

To return. Another class of exceptions to the general rule, by which priority is determined by the order of time, is to be found in certain decisions of the Bombay High Court, based upon the rule of Hindu law, by which preference is, in some cases, given to a mortgage followed or accompanied by possession. The application of the doctrine is, however, confined only to a few districts in that presidency. As I told you in a preceding lecture, preference is given only to a puisne incumbrancer without notice of the prior security; and, as registration at the present day serves the same purpose of publicity as tradition in ancient law, the delivery of possession to the mortgagee affords no protection against an earlier registered security. This is probably the ground on which the application of the rule of Hindu law has been narrowed in recent decisions, for registration, of itself, could not alter a rule of law, except so far as effect may be given to it by statute. (*Itcharam v. Raiji*, XI Bom. H. C. Rep., 4; *Shringarpure v. Pethe*, I. L. R., II Bom., 662. See also the cases cited in Mayne's Hindu Law, §§ 362—3.)

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Exception
to rule of
priority.

Another important exception to the general rule touching the priority of securities, is recognised in favor of advances in the nature of salvage, that is, advances made for the purpose of protecting a property from forfeiture or destruction⁽ⁱ⁾. The lien of the salvor is known as a privileged lien, and upon the plainest principles of equity, takes rank above every other charge on the property. This rule obtains in almost every system of law in which salvage liens are recognized. There is another peculiarity about salvage liens which I ought to notice. It is that among themselves they are entitled to priority in the inverse order of their dates. The general order is here reversed, and the charge which is latest in point of time is entitled to preference over others earlier in date. The rule rests upon the obvious ground that, unless the last advance had been made, the property could not have been preserved for the benefit of the previous lenders.

Salvage
liens.

In the matter of *Thorpe* (2 Sm. and Giff., 579) Lord St. Leonards, referring to the Irish cases on the subject, said: "In Ireland it is a very common equity to have as a prior

English
cases on
the point.

(i) In the English law the right of the trustee to be indemnified out of the trust estate takes precedence of charges created by the *cestui que trust*. (*Exhall. Coal Co. Re.*, 35 Beav., 449.)

LECTURE charge to all other incumbrances what is called salvage
XII. money:—Where a lease-hold estate, or an estate held for
lives to which half-a-dozen people are entitled in succession, many of them being mortgagees according to certain priorities, the last man of all who is entitled after everybody being in possession redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody; this payment is what is called salvage money. That is an established equity and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anybody beyond a charge, it is acquired by that payment in the shape of redemption money.” (See also *Cleary v. M'Andrew*, 2 Moo. P. C., N. S., 235; *Angell v. Bryan*, 2 J. & L., 763; *Shearman v. British Empire Ass. Co.*, L. R., 14 Eq., 4, which, however, has been reflected upon in subsequent cases notably in *Leslie v. French*, 23 Ch. D., 552, and *Fulcke v. Scottish M. I. Co.*, 34 Ch. D., 234.)

Salvage
lien how
discharged.

The lien of the salvor may be discharged and his priority lost by his taking a contractual mortgage, but the lien will not be discharged by the acceptance of another security which becomes worthless. (*Kehoe v. Hales*, 5 Ir. Eq. R., 597.) The rule, however, would seem to be subject to the qualification that the mortgagee cannot acquire any higher rights than those of the mortgagor (*Inman v. Inman*, L. R., 15 Eq., 260; *Clack v. Holland*, 19 Beav., 262.) In conclusion, I must throw out a caution that it does not follow that a person lending money to another for the purpose of preventing a forfeiture, will be entitled to a privileged lien (*j*). There is no direct authority on the point, and I do not think it necessary to offer any opinion on it one way or the other. In some systems of law, however, as I have already pointed out, charges of this nature are entitled to preference over others earlier in date.

Principle
of priority.

The principle on which the priority of a mortgage to secure future advances should be determined, is a question of some nicety. The general rule is, that if, by the terms of the instrument, the mortgagee is bound to make the advance, he would be entitled to the same priority as if the money had been advanced at the execution of

(*j*) Mr. Fisher is of opinion that the lender is entitled to such a lien. (*Fisher's Mortgage*, 577, citing *Sloane v. Mahon*, 1 Dr. & War., 189).

the mortgage. (Story's Equity Jurisprudence, § 1023.) If, however, the terms do not bind the mortgagee to make any advances, no present debt is created, and it seems that the mortgagee would be postponed in respect of any advances made by him after notice of a subsequent incumbrance. It follows *a fortiori* that a purchaser of the equity of redemption will not be bound by such advances (*London and County Banking Company v. Thomas Rankin*, 6 App. Cas., 722; *Bradford B. Co. v. Briggs*, 12 App. Cas., 29; *Govindrav v. Ravji*, I. L. R., XII Bom., 33; *Hopkinson v. Rolt*, 9 H. L., 514; *Bradford Banking Company v. Briggs*, 29 Ch. D., 149. Cf. *Shaw v. Neale*, 6 Ho. Lo. Cas., 581.) The mortgagor is in effect the owner of the property, and has a right to go into the market and to borrow money upon it, but he would practically be unable to do so if a mortgagee who is not under any obligation to make further advances, and who may never make them could claim priority in the event of his making further advances at some future date. This is now the law in England and will probably be followed in India (k). The only doubt that suggests itself to me is, whether in this country the mortgagee will not be postponed even in the absence of any notice

(k) A different rule has been introduced by sec. 79 of the Transfer of Property Act, based apparently on the judgment of Lord Cranworth in *Hopkinson v. Rolt*, who in dissenting from the majority said :—"The question, therefore, to be considered is, what is the general rule or law of the Court as to the priority of two incumbrancers standing in the position of these parties; *id est*, of a first mortgagee holding a mortgage to secure a present debt and future advances not exceeding a fixed amount, and a second mortgagee, there being at the time of the execution of the second mortgage notice to both mortgagees of both securities.

"I certainly had understood that in such a case, excluding all special circumstances, the first mortgagee would be secure for any subsequent advances covered by his security, even though he had notice of the second mortgage. This is so laid down on authority, has, I believe, been often acted on, and seems to me perfectly just and reasonable.

"Mortgages are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is once laid down and understood, that a person advancing money on a second mortgage with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of. He is aware when he advances his money, of the imperfect nature of the security, and acts at his peril. The only question therefore, is, whether this has been the law laid down and acted on in the Court of Chancery, where alone questions on this head can be raised."

LECTURE in respect of advances made by him after the execution
 XII. by the debtor of a mortgage on the same property in favor of another person. There is, however, no authoritative decision on the point, and I have drawn your attention to it only for the purpose of pointing out that the English rule must not be accepted without a more careful examination of the principle on which it rests than I am now able to give to the question.

Tacking. The discussion has conducted us to a topic which is familiarly known to English lawyers as tacking, and on which it is necessary to make a few observations. Now, the right of tacking was, as I told you, recognised to a certain extent in Roman law, which would not suffer the pledgor to redeem the pledge without paying to the pledgee, not only the debt for which the security was given, but also any other claim for money in writing possessed by the creditor against the pledgor. The right, however, could not, in any case, be exercised to the prejudice of a third person. This qualified right, however, is not what English lawyers understand by "tacking." Building upon the maxim "where the equities are equal, the law shall prevail," the English Court of Chancery had introduced a highly artificial rule, by which a mortgagee may, under certain conditions, entitle himself to priority over an incumbrance earlier in point of date. The doctrine may be thus stated: a mortgagee without notice, purchasing the first incumbrance, shall thereby protect his estate against an intermediate incumbrance, although he purchased in the incumbrance after he had notice of the subsequent incumbrance. You will observe that the first mortgagee has what is called the legal estate, and, as the mortgagee purchasing in the first incumbrance, advanced the money without notice of the intermediate incumbrance, he has, at least, as strong an equity as the intermediate incumbrancer. Equity will not, therefore, disarm him of the advantage which he has secured for himself, and thus "the equities being equal, the law shall prevail."

Origin of
 the doctrine.

The origin of the doctrine is thus explained by Lord Hardwicke:—"As to the equity of this Court," observes his Lordship, "that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then being puisne, taking in the first incumbrance, shall squeeze out and have satisfaction before

the second, the equity is certainly established in general, and was so in *Marsh v. Lee*, by a very solemn determination by Lord Hale, who gave it the term of the 'creditor's *tabula in naufragio*,' that is the leading case. Perhaps, it might be going a good way at first; but it has been followed ever since, and I believe was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different Courts, and creates different kinds of rights in estates; and, therefore, as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, this Court never thought fit that, by reason of a prior equity against a man who had a legal title, that man should be hurt; and this, by reason of that force, this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for, if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est jure*, must hold." (*Wortley v. Birkhead*, 2 Ves., 571) (l).

It is hardly necessary to add that our Courts have refused to follow the English doctrine on the subject. (*Odoychurn v. Bhujohury*, XI Suth. W. R., 310.) There is, however, another maxim of the English Court of Chancery perhaps less open to objection, which applies not to tacking—properly speaking—but to the right to a consolidation of all the securities possessed by the creditor irrespective of any questions to priority. He who seeks equity must do equity, and redemption being an equitable right, the mortgagor may not redeem without on his part doing equity to the mortgagee. Thus, if the owner of two or more different estates mortgage them successively for distinct debts to the same person, the mortgagee has a right to insist that one security shall not be redeemed alone, leaving him exposed to the risk of deficiency as to the others, but that the mortgagor must redeem him entirely. The right in fact claimed by the mortgagee in such cases is analogous to the right recognised by the Roman law, and has been admitted by our Courts as resting not upon

Tacking,
not followed
in India.

(l) The principle of tacking was abolished by 37 & 38 Vict., c. 78, sec. 7, but restored by 38 & 39. Vict., c. 87, sec. 129.

LECTURE XII. any technical ground, but upon the general principles of justice and equity. (*Vithal v. Daud*, VI Bom. H. C. Rep., 90.) The doubt, however, which I have expressed in respect to the applicability of these general maxims to mortgages governed by the Bengal Regulations, applies also to the present question. The Courts in the other provinces are not fettered by any positive enactments, and are, therefore, in a position to introduce a larger number of the doctrines of the English Court of Chancery than the Courts of Allahabad and Calcutta.

Consolidation. But the rule of English law, touching the consolidation of securities, however unexceptionable when confined to the mortgagor or his heir, becomes of questionable propriety when extended to a purchaser, even though he should have purchased without notice of any other mortgage. (*Ireson v. Denn*, 2 Cox, 425; *Cummins v. Fletcher*, 14 Ch. D., 699; *Mills v. Jennings*, 13 Ch. D., 639; *Cracknall v. Janson*, 11 Ch. D., 1; *Harter v. Colman*, 19 Ch. D., 630; *Jennings v. Jordan*, 6 App. Ca., 698; *Baker v. Gray*, 1 Ch. D., 491.) The doctrine has not, however, yet received the same extension in this country, and will probably be recognised only in a qualified form (m).

Unsecured debts. It would seem that debts, which are not secured by a mortgage, may not be consolidated. In pledges of moveables, however, the Legislature has recognised a qualified right to tack subsequent advances. There is, however, no authority for extending the right to a mortgage of land. (*N. W. P.*, Vol. IX, p. 465; 1860, p. 122.) It seems, however, that if there is an agreement that the equity of redemption shall be postponed, till a subsequent debt is paid, the latter may be added to the mortgage-debt, so as to prevent redemption merely on payment of the mortgage-money. And this right, it seems, may be exercised even against a purchaser of the mortgaged property. (*Allu Khan v. Roshan Khan*, I. L. R., IV All., 85.) The authorities cited in the judgment from the Roman and French law, however, only allow consolidation as against the mortgagor, and although a different rule, where there were two or more mortgages, was acted upon for a long time, by the English Court of Chancery, the rule itself, together with the various refinements which grew out of it, and against which successive Equity Judges had been struggling, has

(m) The doctrine of consolidation has been abolished in England by sec. 17 of the Conveyancing Act of 1881 (44 & 45 Vict., c. 41.)

been now swept away by the Legislature. Even in Eng-
 land, however, there could be no consolidation, except where
 both the debts were secured on mortgage, although, as a
 rule, a bond-debt, and, since 3 & 4 Wm. IV, c. 104, even
 a simple contract debt may be tacked as against the heir,
 and also the beneficial devisee. (Coote, pp. 881—884.) This
 is permitted only to avoid circuitry of actions, and the prin-
 ciple was followed by the Bombay High Court in the case
 of *Ragho v. Balvant* (I. L. R., VII Bom., 101. Distinguish
Narayan v. Pandurang, I. L. R., VII Bom., 526. Cf.
Yashvant v. Vithoba, I. L. R., XII Bom., 231.)

I shall next proceed to discuss the various ways in
 which priority may be forfeited. Now, a mortgagee for-
 feits his priority if he is guilty of fraud, either actual
 or constructive. Thus, if he should induce another by
 concealing his own mortgage to lend money on the securi-
 ty of the property pledged to himself, he will be post-
 poned to the subsequent incumbrancer whom he has
 misled. There may be no duty upon the prior mortgagee
 voluntarily, and without being asked, to disclose his
 security; but any actual misleading, either by acts or
 declarations, will be followed by a forfeiture of his pri-
 ority. It would take me much beyond the limits I have
 proposed to myself in this lecture, to state the various
 circumstances which would be sufficient to fasten upon
 the prior mortgagee a charge of actual or constructive
 fraud. The subject is discussed in Story's Equity Juris-
 prudence, and other standard works to which I would re-
 fer those who wish to pursue the inquiry.

The question was elaborately discussed in this country in
 the case of *Salamat v. Budh Singh* (I. L. R., I All., 303.)
 In delivering the judgment of the Court, Mr. Justice Turner
 observed:—"It is a rule of equity that where a man by his
 conduct or language wilfully causes another to conceive an
 erroneous impression and to act upon the impression he has
 so formed and to alter his position, he cannot afterwards be
 allowed to claim any benefit for himself by asserting that the
 facts were contrary to the impression he had produced, and
 it may be added that a man must be presumed to intend the
 natural consequences of his conduct or language. If a man
 stands by and sees another sell property which belongs to
 him, he is bound to proclaim his title. If he fails to do so
 and a stranger is induced by his silence to believe he has no
 title, and under that impression expends his money on the

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Forfeiture
of priority.

LECTURE XII. purchase of the property, equity holds the man so standing by, if he fails to explain his silence, guilty of constructive fraud, and postpones his title to that of the purchaser. The cases on this point are noted in Story's Equity Jurisprudence § 393, and in Fisher on Mortgages, § 1541. It is, however, of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence. It is not, therefore, enough to show merely that a man, knowing that persons are dealing with his property out of his presence, keeps silence—Story's Equity Jurisprudence, § 394. 'A mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate'—Fisher on Mortgages, § 1541. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then in either of these cases the mortgagee will be held guilty of constructive fraud. Again, although the mere attestation of the execution of a mortgage-deed by a prior mortgagee is not, as it was at one time held to be, sufficient to create estoppel (*n*), because it does not necessarily follow that a witness is aware of the contents of the deed of which he attests the execution, yet where that knowledge is brought home to him, and there are circumstances to show that he acted dishonestly and disingenuously to the mortgagee, and the mortgagee was in consequence deceived, the prior mortgagee will be deprived of his priority." (See also *Munnoo Lall v. Lalla Choonee Lall*, XXI Suth. W. R., 21; *Bhurrut v. Gopal*, XI Suth. W. R., 286; V Agra H. C. Rep., 402. Distinguish *Banwari v. Muhammad*, I. L. R., IX All., 690.)

Forfeiture by laches. A mortgagee may also forfeit his priority by his own laches. Thus, for instance, if the mortgagee should suffer the title-deeds to remain in the custody of the mortgagor, he will, under certain circumstances, be postponed to a subsequent incumbrancer who may have advanced money on the faith of the title-deeds. The earlier English

(*n*) This reason, however, will scarcely hold good in India where, as a rule, witnesses are perfectly well aware of the contents of the documents attested by them. (*Matadeen Roy v. Mussoodeen*, X Suth. W. R., 293; but see *Rajlukhee v. Gokool Chundra*, XII Suth. W. R., P. C., 47.)

authorities were very stringent against the mortgagee who put the mortgagor in a position to mislead third persons; but the rule has been considerably relaxed in more recent cases. The mere possession of the title-deeds by the second mortgagee will not, as the law now stands, give him priority. There must be some act or default on the part of the first mortgagee to have this effect. The non-possession, however, of the title-deeds is a circumstance which the mortgagee is bound to explain. But if he can satisfy the Court that the absence of the title-deeds was reasonably accounted for by the mortgagor when he obtained his mortgage, or that he was subsequently induced to part with them, under such circumstances as to exonerate him from any serious imputation of negligence he does not lose his priority. In other words, something more must be shown than the mere parting with the deeds. But although slight negligence will not be sufficient to deprive an incumbrancer of his priority, the negligence may nevertheless be so gross as to create an equity in favour of a *bond fide* purchaser. The law on the subject is thus stated in Dart:—"A mortgagee not inquiring for the deeds has been postponed to a prior equitable incumbrancer (*Whitbread v. Jordon*, 1 Y. & C., 303) upon the ground (see *Jordon v. Smith*, 1 Ph. at p. 255) of his having purposely abstained from making inquiry, the mortgage being for securing a pre-existing debt; that, in short, there was wilful blindness: and it has been held, in some cases, that the mere omission to ask for the deeds may be sufficient to postpone a mortgagee or purchaser to the equitable lien of the actual holder (*Worthington v. Morgan*, 16 Sim., 547; *Peto v. Hammond*, 30 B., 493; *Clarke v. Palmer*, 21 Ch. D., 124; *ante*, p. 592); although the case is different if a *bond fide* inquiry is made, and a reasonable excuse given for their non-production (*Hewitt v. Loosemore*, 9 Ha., 449.) In one case, the mere omission of a solicitor in preparing a marriage settlement of land in Middlesex, to examine the earlier title, was held sufficient to postpone the settlement to a prior unregistered charge (*Wormald v. Maitland*, 35 L. J., Ch., 69; but see comments on this case in *Agra Bank v. Barry*, L. R., 7 H. L., 135); but in a later case in the House of Lords, where the authorities were fully reviewed, it was held that the omission of the solicitor of a legal mortgagee to require production of the title-deeds, where a reasonable excuse was given for their non-production, was insufficient to post-

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pone the legal mortgagee to a prior equitable incumbrancer (*Agra Bank v. Barry, supra*); and it seems to be now well settled that, although the omission to call for the deeds may be evidence of a design, inconsistent with *bonâ fide* dealing (*Per* Lord Selborne, in *Agra Bank v. Barry, supra*), to avoid knowledge of the true state of the title, yet it does not of itself amount to constructive notice, except under circumstances from which a fraudulent intention must be presumed (*Ratcliffe v. Barnard*, 6 Ch., 652.)" (*Dart's Vendors and Purchasers*, pp. 979-980.)

In a very recent case in England, the propositions deducible from the authorities have been thus formulated by Lord Justice Fry.

Summary
of English
cases.

(1) That the Court will postpone the prior legal estate to a subsequent equitable estate; (a) where the owner of the legal estate has assisted in, or connived at, the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiring after or keeping title-deeds may be, and in some cases has been held to be sufficient evidence, where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created, has, by the fraud or misconduct of the agent, been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner (c). (*Northern C. E. F. I. Company v.*

(c) Mere carelessness as the context shows here includes gross carelessness; the words which follow are these:—"Now to apply the conclusions thus arrived at to the fact of the present case. That there was *great carelessness* in the manner in which the plaintiff company through its directors dealt with their securities, seems to us to admit of no doubt. But is that carelessness evidence of any fraud? we think that it is not. Their carelessness may be called gross, but it was carelessness likely to injure and not to benefit the plaintiff company, and accordingly has no tendency to convict them of fraud." In this case the Court classified the decisions bearing on the conduct of the mortgagee under two heads: the first referring to cases in which the mortgagee does not obtain possession of the title-deeds, and, the second where the mortgagee having received the deeds, has subsequently parted with them or suffered them to fall into the hands of the mortgagor. The cases under the first head are thus classified—

(1) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds and has been postponed, either to a prior equitable estate as in *Worthington v. Morgan* (16 Sim., 547), or to a subsequent

Whipp, 26 Ch. D., 494. Cf. *in re Vernon, Ewens & Co.*, 32 Ch. D., 165.) LECTURE XII.

It is only, however, with regard to legal mortgagees that mere negligence, however gross, will not be sufficient to justify the Court in postponing them. A different rule obtains as regards equitable titles. In such cases, the general principle holds good that where one of two innocent persons must suffer, it shall be he who by his own acts and conduct has caused the other to be imposed upon.

The question in these cases is, whether the person claiming under the prior title has not been guilty of such

equitable owner who used diligence in inquiring for the title-deeds, as in *Clark v. Palmer* (21 Ch. D., 124.) In these cases the Courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and in the latter case that a subsequent mortgagee who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could, as against him, take advantage of the fraudulent intent. Cf. 29 Ch. D., 221.

Quære.—Would it not be more correct to say that it was a case of estoppel by negligence?

(2) Where the legal mortgagee has made inquiry for the deeds, and has received a reasonable excuse for their non-delivery, and has accordingly not lost his priority, as in *Barnett v. Weston* (12 Ves., 130); *Hewitt v. Loosemore* (9 Hare, 449); *Agra Bank v. Barry* (L. R. 7 H. L., 135.) Cf. 29 Ch. D., 725.

(3) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all and has accordingly not lost his priority, as in *Hunt v. Elmes* (2 D. F. & J., 578); *Ratcliffe v. Barnard* (Law Rep., 6 Ch., 652); and *Colyer v. Finch* (5 H. L. Cas., 905.)

(4) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purpose of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry Herrick v. Attwood* (2 DeG. & J., 21). This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority.

The cases under the second head are thus classified:—

(1) Where the title-deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority over the subsequent equities, as *Peter v. Russel*, or *Thatched House Case* (1 Eq., Ca., Abr., 321); *Martins v. Cooper* (2 Russ., 198.)

(2) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee. (*Briggs v. Jones*, Law Rep., 10 Eq., 92.) In such cases the Court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry Herrick v. Attwood* (2 DeG. & J., 21); *Northern C.F. E. I. Company v. Whipp* (26 Ch. D., 492-93.)

LECTURE XII. — negligence as would raise an equity against him so as to prevent him from enforcing his rights to the prejudice of the other party. He may have dealt innocently, but there may, notwithstanding, be circumstances sufficient to raise an equity against him.

Onus of proof. But a pre-existing equitable title cannot be taken away except upon some tangible and distinct ground, the onus of proving which lies on the person who seeks to displace it. As a rule, priority is forfeited only where there has been misrepresentation, misconduct or negligence. In the case of a trustee, for instance, it being the ordinary and permitted usage of *cestui que trusts* to hand over to their trustee the muniments of title and indicia of property; this fact of itself would not postpone the claim of the beneficiaries to a subsequent equitable interest created by the trustee in breach of his trust. (*Shropshire Union, &c., Company v. The Queen*, 7 H. L. C., 496. Cf. *In re Vernons, Ewens & Co.*, 32 Ch. D., 165, and cases cited therein.)

Effect of fraud. Perhaps there are few questions more difficult to decide than which of two innocent parties must suffer from the fraud of a third. In *Gordon v. James* (30 Ch. D., 249), Lord Justice Lindley in speaking of this class of cases says: "Now that is a very common problem for us to solve, and I apprehend that the principle to be brought to its solution is perfectly well established. The case depends not merely upon principles applicable to the legal estate, but upon a principle common to the whole law of agency. This principle is correctly stated by Mr. Justice Story in his book on Agency, where he lays down as one of the principles running through the whole doctrine of principal and agent: 'Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon'" (30 Ch. D., 258).

Effect of carelessness. The question therefore in all such cases is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other. Mere carelessness or want of prudence may, therefore, apart from fraud, be sufficient to postpone a prior equitable claim, and the principle certainly seems to be a reasonable one. (*National P. Bank of England v. Jackson*, 33 Ch. D., 1.) I must repeat that it is impossible from the nature of things to lay down any hard and inflexible rule. Each case must depend on its own circumstances, and when a case is on the line,

or very nearly on it, opinions must necessarily differ. It is difficult to extract any uniform principles from the English cases owing to the entanglement created partly by the doctrine of constructive notice, and, I must add, partly to language which seems to confound negligence with fraud (*p*). (See in passing, the observations of Lord Eldon in *Evans v. Bicknell*, 6 Ves., 174, and of Lord Cranworth in *Colyer v. Finch*, 5 H. L. C., 905; in *Agra Bank v. Barry*, Law Rep., 7 H. L., 135, however, Lord Selborne, in addressing the House of Lords, uses more guarded language.)

It is necessary to observe that the mere fact that the mortgagee has put it indirectly in the power of the mortgagor to commit a fraud would not deprive him of his priority unless he was himself guilty of gross negligence or fraud. Thus, where the mortgagee created a sub-mortgage and the sub-mortgagee delivered the deed to the mortgagor,

(*p*) In speaking of the confusion between negligence and dolus, Austin says: "Now this (it appears to me) is a mistake. Intention (it seems to me) is a *precise* state of the mind, and cannot coalesce or commingle with a different state of the mind. 'To intend,' is to believe that a given act will follow a given volition, or that a given consequence will follow a given act. The chance of the sequence may be rated higher or lower; but the party *conceives* the future event, and believes that there is a chance of its following his volition or act. Intention, therefore, is a state of consciousness.

But negligence and heedlessness suppose *unconsciousness*. In the first case, the party does *not* think of a given act. In the second case, the party does *not* think of a given consequence.

Now, a state of mind between consciousness and unconsciousness—between intention on one side, and negligence or heedlessness on the other—seems to be impossible. The party thinks, or the party does not think, of the act or consequence. If he thinks of it he *intends*. If he does not think of it, he is *negligent* or *heedless*. To say that negligence or heedlessness may run into intention is to say that a thought may be *absent* from the mind, and yet (after a fashion) *present* to the mind.

Nor is it possible to conceive that supposed mongrel or monster, which is *neither* temerity *nor* intention, but partakes of both:—A state of mind lying on the confines of each, without belonging precisely to the territory of either.

The party who is guilty of rashness thinks of a given consequence: but, by reason of a misapposition arising from insufficient advertence, he concludes that the given consequence will *not* follow the act in the given instance. Now, if he surmise (though never so hastily and faintly), that his misapposition is unfounded, he *intends* the consequence. For he *thinks* of that consequence; he believes that his misapposition *may* be a misapposition; and he, therefore, believes that the consequence *may* follow his action. (Austin's Jurisprudence, Vol. I, pp. 428-429.) To speak of negligence so gross as to amount to fraud seems, as pointed out by Lord Justice Fry, like speaking of carelessness so great as to amount to design. The proposition sometimes met with that negligence may be so gross as to be evidence of fraud betrays a similar confusion of ideas.

LECTURE XII. who was thereby enabled to sell the property as unincumbered, the mortgagee was allowed to enforce his security against the purchaser, notwithstanding that he purchased in good faith, believing that the mortgage had been redeemed. (*Mutha, v. Lumi*, I. L. R., VIII Mad., 200. Cf. *Somasundara Zambiran v. Sakkarai Pattan*, IV Mad. H. C. Rep., 369.) We are frequently obliged in the course of business to entrust the possession of our property to others, but this would not entitle a fraudulent transferee or depository to give a valid title to a third party as against the true owner. To take a familiar illustration, if I leave my keys with my butler, that would not authorize him to pledge my plate. And it would be no defence for the pawnee to say that he acted in good faith.

Mortgagee in possession. I have already explained how the first mortgagee in possession is postponed as regards the rents and profits which he suffers the mortgagor to receive after notice of a puisne incumbrance. The first incumbrancer must not exercise his rights unfairly to the prejudice of succeeding incumbrancers; and in England if a mortgagee permits the mortgagor to receive the rents and profits without requiring the payment of interest, such unpaid interest shall not affect the land as against a subsequent mortgagee. (*Bentham v. Haincourt*, 1 Eq., Ca. Abr., 320.)

Renewal of mortgage-deeds. A practice obtains in this country, which is not the less objectionable because it is almost universal. When money is advanced by way of further charge, the original mortgage-deed is not unfrequently cancelled, and the property pledged by a second instrument for the consolidated sum. Deeds of further charge are very rarely executed outside the Presidency Towns. Again, it frequently happens that when the mortgagor is unable to repay the loan, an account is taken of the moneys due to the mortgagee on his security, and a fresh bond is executed, by which the property is pledged for the original debt with the accumulated interest. The property, however, may have been intermediately pledged to a third person, and the mortgagee may be thus in danger of losing his priority. The reported cases on the subject, however, show that the Court will not presume, except on very strong grounds, that the original security was intended to be relinquished. (*Gopee Bundhoo v. Kalee Pudo*, XXIII Suth. W. R., 338; S. D. A., 1856, p. 942; 1857, p. 1184.) In *Tenison v. Sweeny*, (1 Jo. & Lat., 717), Lord St. Leonards made the following

remarks :—"Then another point was started that, as the successive mortgages were for the sum secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether by taking a new security for their old debt, and for further advances they do not prejudice their original securities." (See also *Miln v. Walton*, 2 Y. & C., Ch., 354.)

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judgment.

The above principle has been acted upon by our Courts in several cases, and it makes no difference that arrears of interest or other properties are included in the subsequent mortgage, or that the rate of interest is varied. The mortgagee, however, ought not to part with the first deed, as the delivery of the mortgage-deed to the mortgagor might be regarded as showing an intention to waive the first security; I mean an artificial as opposed to the real intention of the mortgagee. (See among other cases *Goluknath v. Lalla Premal*, I. L. R., III Cal., 307; *Dullabhdas v. Lakshmandas*, I. L. R., X Bom., 88.) The subject has been already discussed by me when treating of the extinction of securities. It must not, however, be supposed that, as against an intermediate incumbrancer, the security will be entitled to priority, except to the extent of the advances actually made before the execution of the subsequent mortgage, and where the interest is turned into principal, the agreement for compound interest will have no effect as against the intermediate incumbrancer.

As I have just said, the Court is always anxious to prevent if it can, the extinction of the mortgage in cases in which the mortgagee is not to blame. Thus, where a mortgagee relinquished his security, on certain property for other property which afterwards turned out to belong to a third person, the Court held that the earlier security was not extinguished, and that it could be enforced against a *bonâ fide* purchaser for value who bought before the

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property was released (*Safdarali v. Lachman*, I. L. R., II All., 554). But the security will not be available against a person dealing with the mortgagor subsequent to, and on the faith of, the release. Where a second mortgagee therefore released his security in exchange for forged securities, he lost his priority over the third incumbrancer who took without notice. (*Eyre v. Burmester*, 4 DeG. Jo., 435; *Scholefield v. Templer*, 4 DeG. & J., 429.)

Lis pendens.

In connection with the question of priority there is one topic, on which a few words will not perhaps be thrown away. I allude to the doctrine of *lis pendens*. In consequence of the rule *pendente lite nihil innovetur*, the priority of a security cannot be affected by any incumbrance created by the mortgagor during the pendency of a suit for foreclosure or sale. This maxim is not founded upon any technical ground as to constructive notice, but on the broad principle, that litigation would be interminable if any of the parties to an action could create any right in favor of a third person during the pendency of a suit. As observed by Lord Cranworth in *Bellamy v. Sabine* (26 L. J., Ch., 797, N. S.):—"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though, undoubtedly, the language of the Courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings, would always render a new suit necessary, and so interminable litigation might be the consequence." (*Ballajee Gunesh v. Khushalji*, XI Bom. H. C. Rep., 24; *Gulabchand v. Dhondie*, XI Bom. H. C. Rep., 64; *Ravji Narain v. Krishnajeel Lakshman*, XI Bom. H. C. Rep., 139; *Pullukdharee v. Mohabir Sing*, XXIII Suth. W. R., 382; see also the

notes to section 52 of the Transfer of Property Act, LECTURE
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post.)

It is only necessary to add that, under Regulation XVIII of 1806, the application of the mortgagee for foreclosure would seem to be the commencement of the suit for the purposes of *lis pendens*. I had occasion to consider the question in a previous lecture, and need not, therefore, repeat what I then said (See Lecture VI). It would, however, not be safe for the mortgagee to disregard the transfer altogether, and where the alienation takes place after the institution of the foreclosure proceedings, but before the commencement of the regular suit by which they are almost invariably followed in Bengal, the purchaser ought to be made a party defendant, as well as the original mortgagor.

Here I conclude the lectures of the term. I have endeavoured to give you a short account of the law of securities in this country. A mere beadroll of cases, however useful to the practitioner, would have been of doubtful utility to the student, and I have, therefore, attempted to explain, as fully as I could in the compass of these lectures, the principles on which the law is founded. 'He knoweth not the law who knoweth not the reason of the law' is a saying which the student should always bear in mind, and you will pardon me if I venture to affirm what is now accepted almost as a truism that a careful study of general principles as illustrated in different systems of law, will not be wholly useless to you when you enter upon the practical duties of the profession. It may not be given to every one of us to attain high forensic skill, but depend upon it, the culture gained by the scientific study of law is never wholly thrown away, even though it may not in every case be crowned with professional success.

NOTE A.

The question whether notice is material under the Indian Registration Acts has given rise to a conflict of decisions. According to the Madras High Court notice is not material while a different view has been taken by the Bombay as well as by the Calcutta and Allahabad High Courts. (See, among other cases, *Aboul v. Raghu Nath*, I. L. R., XIII Cal., 70; *Ram v. Dhanauri*, I. L. R., VIII All., 540; *Shivram v. Genu*, I. L. R., VI Bom., 515; *Bimaraz v. Papaya*, I. L. R., III Mad., 46; *Kondayya v. Gurusappa*, I. L. R., V Mad., 139; *Madar Sahib v. Subbarayalu Nayadu*, I. L. R., VI Mad., 88.) In this conflict of opinion I have ventured to reproduce in this note what I said in the first edition.

"It is necessary to observe that, under the Indian Registration Act,

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notice is immaterial. A registered instrument will be entitled to priority in every case, provided that the transfer is not merely colorable, or as it is usually called a paper transaction. It is true the Act is silent as to the effect of notice, but it does not follow that the protection was intended to be confined only to a mortgagee without notice of a prior unregistered security. The construction put by Lord Hardwicke on the English Act has been questioned by several eminent Judges as trenching upon the policy of the registration laws, and it would certainly require strong argument to show that the Indian Legislature intended to introduce into this country a doctrine which would have the effect of frittering away the provisions of a most beneficent enactment. The omission from the recent Acts of the clause in the second Section of Act XIX of 1843, by which notice was expressly declared to be immaterial, may perhaps lend some color to the suggestion that the old doctrine embodied in the earliest Regulation on the subject was intended to be revived. It would, however, not be safe to build any argument on such an omission.

It would carry me much beyond the limits which I have proposed to myself in the present lecture to enter upon a full discussion of the question. I may, however, point out that a comparison of the successive Registration Acts down to the 19th of 1843, shows that it was necessary in the last statute to provide expressly that notice was immaterial in order to guard against the application of the English doctrine which had been embodied in the original Regulation. Besides, it may fairly be asked why has not the Legislature in the later Acts expressly declared its intention to confine the protection afforded by registration only to subsequent alienees taking without notice of a prior alienation. Such an enactment was contained in the original Regulation, and, if the doctrine was intended to be revived after having been advisedly repealed by subsequent legislation, the provision would probably have been repeated in the more recent statutes.

I have been induced to make the foregoing observations, because in the case of *Jirandass v. Framji* (VII Bom. H. C. Rep., 45), the Court seems to have held that the English doctrine of notice was applicable to Act XVI of 1864, the provisions of which on this point are similar to those of the present statute. In that case express notice was alleged; but if you once introduce the doctrine of notice, I do not see how questions of constructive notice can be wholly shut out, and thus the protection afforded by the Registration Act would be, in great measure, if not wholly, illusory. The doctrine, however, laid down by the Court in *Kasharji v. Framji* was not actually necessary for the decision of the case, as the mortgage to the registered mortgagee was, on the face of the instrument, subject to the prior unregistered incumbrance. No question of priority, therefore, could possibly arise, as the subsequent mortgage did not purport to be a mortgage of anything more than the bare equity of redemption. (Compare *Kishore Bhat v. Jorabhai*, VII Bom. H. C. Rep., A. J., 56.)"

It seems to me almost as if there was a slight touch of sarcasm in the observation made by Lord Cairns in the well-known case of *Agra Bank v. Barry* (7 H. L. C. 135). In the course of his speech the noble and learned Lord said: "Any person reading over that Act of Parliament would perhaps in the first instance conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered till afterwards. But by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding

standing the apparent stringency of the words contained in this Act of Parliament, still if a person in *Ireland* registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed." (*Agra Bank v. Barry*, 7 H. L. C., 147.) In *Greaves v. Sofield* (14 Ch. D., 578), Lord Justice Bramwell observed :—" I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by Statute. I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have, they seem to me to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases."

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It is not quite clear upon the authorities whether the notice in order to postpone a registered security must not be actual. According to the English cases, it seems that the notice must be actual. Mere negligence will not postpone a registered deed. The principle of constructive notice therefore has either no application or at best only a very limited application in countries where registers exist. (See *Agra Bank v. Barry*, 7 H. L. C., 135, and the cases cited in it.)

I may mention that, according to the latest Registration Acts in the English Statute Book (47 & 48 Vict., c. 54 ; 48 & 49 Vict., c. 26) registration is made the absolute test of priority except in cases of actual fraud, and the old equitable rule which has been adopted by the Indian Courts as based upon the most unimpeachable equity, has been expressly abolished.

TRANSFER OF PROPERTY ACT, 1882.

THE
TRANSFER OF PROPERTY ACT, 1882.
ACT No. IV of 1882.

(AS AMENDED BY ACT III OF 1885.)

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.
*(Received the assent of the Governor General on the 17th
February 1882.)*

*An Act to amend the law relating to the Transfer of Property
by act of Parties.*

WHEREAS it is expedient to define and amend certain Preamble.
parts of the law relating to the Transfer of Property by
act of Parties; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. This Act may be called “The Transfer of Property Short title.
Act, 1882”:

It shall come into force on the first day of July, 1882; Commence-
ment.

It extends in the first instance to the whole of British Extent.
India except the territories respectively administered by
the Governor of Bombay in Council, the Lieutenant-Gov-
ernor of the Punjab and the Chief Commissioner of British
Burmah.

But any of the said Local Governments may, from time
to time, by notification in the local official Gazette, extend
this Act to the whole or any specified part of the territories
under its administration.

And any Local Government may, with the previous con-
sent of the Governor General in Council, from time to time,
by notification in the local official Gazette, exempt, either

ACT IV OF
1882,
SECTION
2.

retrospectively or prospectively, any part of the territories administered by such Local Government from any or all of the following provisions, namely, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three.

"Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise."

Repeal of
Acts.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned (a). But nothing herein contained shall be deemed to affect—

Saving of
certain en-
actments,
incidents,
rights, lia-
bilities, &c.

(a) the provisions of any enactment not hereby expressly repealed:

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: (b) or

(d) save as provided by section fifty-seven and chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction: and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

This section only accentuates the well-known proposition that the operation of statutes is not retrospective. (See *Samar v. Karim*, I. L. R., VIII All., 402, a case on the usury laws.) But while saving any right or liability arising out of a legal relation constituted before the Act came into force or any relief in respect of any such right, the section leaves untouched the general rule that statutes which do not interfere with the rights of parties, but merely regulate the practice and procedure of the Courts are retrospective. The Transfer of Property Act, while providing a different procedure for enforcing mortgages, has made no change in the respective rights and liabilities of the parties to such transactions. A mortgagee therefore seeking to enforce a mortgage executed prior to the first of July

- (a) Instances of qualified repeal are to be found in sections 67 and 87.
(b) Compare the provisions of section 6 of the General Clauses Act.

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1882 is not only at liberty to adopt the procedure under the new Act but is bound to do so. (*Ganga v. Kishen*, I. L. R., VI All., 262; *Bhobo Sunderi v. Rakhal*, I. L. R., XII Cal., 583; *Vankata v. Subramanya*, I. L. R., XI Mad., 88. Cf. In the matter of a mortgage by *Nobin*, Sep. 14, 1883, cited in *Belchambers*, p. 340.) But where proceedings for foreclosure had been completed under the Bengal Regulation, it was held that the mortgagee had acquired a right which could not be, and was not intended to be interfered with by the provisions of the Transfer of Property Act. (*Baij Nath v. Mohesram*, I. L. R., XIV Cal., 451; *Silla Buksh v. Lalla Prosad*, I. L. R., VIII All., 388.)

A similar principle has been applied in cases in which although the right of the mortgagee had not been completed, proceedings for the purpose of foreclosing the mortgage had been taken by the mortgagee before the first of July 1882. (*Mohabir Pershad v. Gangadhar*, I. L. R., XIV Cal., 599; *Umesh Chunder v. Chunchun*, I. L. R., XV Cal., 357. Distinguish *Aliba v. Nannu*, I. L. R., IX Mad., 218; *Ranga v. Muttu*, I. L. R., X Mad., 509). But the right to bring the mortgaged property to sale is an incident of the decree, and does not, properly speaking, arise out of the legal relation of mortgagor and mortgagee. The mode of enforcing a decree is a mere matter of procedure, although the right to enforce it is a substantive right. Where, therefore, a mortgage was created in 1879, and the decree for arrears of interest was obtained in 1884, it was held that the mortgagee had not gained a right to have the property sold in satisfaction of his decree by reason of the provisions of section 99 of the Transfer of Property (*Kaveri v. Ananthayya*, I. L. R., X Mad., 129. Distinguish *Denendra v. Chandra*, I. L. R., XII Cal., 436, where the mortgagee obtained a decree for sale in December 1880.)

It is perhaps scarcely necessary to point out that the provisions of the Act will apply to legal relations entered into subsequently to July 1882, although they may arise out of prior transactions. The assignment of a mortgage made after the Act came into force, for instance, will be regulated by the provisions of this Act, although the mortgage may have been made before. It seems that a suit for possession by a mortgagee under a deed of conditional sale alleged to have been foreclosed under Regulation 17 of 1806 will not be converted into an action for foreclosure under the Transfer of Property Act, at any rate where the amendment is for the first time prayed for in appeal. (*Silla v. Lalla*, I. L. R., VIII All., 388; *Lala Jugdeo v. Brij Behari*, I. L. R., XII Cal., 505.)

3. In this Act, unless there is something repugnant in the subject or context,—

“immoveable property” does not include standing timber, growing crops or grass:

“instrument” means a non-testamentary instrument:

“registered” means registered in British India under the law for the time being in force regulating the registration of documents:

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs;

Interpreta-
tion-clause

“immove-
able pro-
perty”:
“instru-
ment”:
“register-
ed”:

“attached
to the
earth”:

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"Notice,"
Cf. sec. 36
A., 1882.

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

and a person is said to have "notice" of a fact when he actually knows that fact, or when, but for wilful abstinence from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

See Conveyancing Act, 1882, section 3.

The Act does not define immoveable property except negatively, and even that with regard to a particular description of property only. The first clause, however, should be read in connection with the definition of immoveable property contained in the General Clauses Act, according to which the term will include "land, benefits to arise out of land; or things, as trees and shrubs rooted, or as walls and buildings imbedded in the earth, or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so rooted, imbedded, or attached; but not standing timber, growing crops or grass." (Section 2, Act I of 1868.) There are various other statutory definitions of immoveable property applicable, however, as a rule, only to the particular Acts in which they occur (cf. section 3, Act III of 1877, *Pandah v. Jennuddi*, I. L. R., IV Cal., 665, and cases cited there).

It must be borne in mind that though the definition excludes growing crops or grass, it does not exclude future crops or herbage which may therefore be the subject of equitable assignment, either by way of sale or mortgage. It is necessary to state that all trees are not timber, but only such as are useful for the purpose of building. In England, certain kinds of trees if they happen to be of a particular age are timber throughout the country, while others may be so by local custom. There is, however, no such classification in this country.

The last clause of the section formulates the doctrine of notice which plays an important part in every system of law, and perhaps nowhere a more important one than in the English law, with its distinction of legal and equitable titles and the numerous rules which have naturally grown out of this distinction. Notice may be either actual, or as it is sometimes called express, or it may be constructive, but there is, generally speaking, no difference between them in their legal consequences, although in certain cases, as for instance where the conscience of a person must be affected in order to postpone his rights as in the case of the Registration Acts, constructive notice will not be sufficient, but actual notice will be necessary. (*Agra Bank v. Barry*, 7 H. L. R., 145, and cases cited therein.)

Actual notice consists in express information of a fact, but vague rumours or the assertions of mere strangers will not be sufficient.

The notice must, as a rule, proceed from a person interested in the property. But it is one thing to say that mere flying reports are not notice, and another to affirm that a purchaser could not in any case be affected by a deliberate and particular statement of an adverse claim unless made by a party interested. (Dart's Vendors and Purchasers, p. 967.)

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The section says that a person has notice not only when he actually knows the fact, but also when but for wilful abstention from an inquiry or search which he ought to have made, he would have known it, and this brings us to the consideration of what is called constructive notice in the English law. Constructive notice has been defined as knowledge which the Court imputes to a person upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (*Hewitt v. Loosemore*, 9 Hare, 449, at p. 455.) In *Jones v. Smith* (1 Hare, 55.) Wigram, V. C., observed: "It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But, I believe, I may with sufficient accuracy for present purposes assert that the cases in which constructive notice has been established resolve themselves into two classes. Firstly, cases in which the party charged, has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice, and secondly, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. But if there is neither on the one hand actual notice that the property is in some way affected, nor on the other hand any fraudulent turning away from a knowledge of facts, which the *res gestæ* would suggest to a prudent mind, but there is merely want of caution, as distinguished from fraudulent and wilful blindness, then the doctrine of constructive notice will not apply; the purchaser will in equity be considered, as in fact he is, a *bonâ fide* purchaser without notice." To the above classification must be added cases of gross negligence said in some cases to be so gross as to be evidence of fraud, and therefore to be visited with the consequences of fraud, although, morally speaking, the party charged may be perfectly innocent, a mode of expression which, I venture to think, serves no useful purpose, and is open to the criticism which has been made on it that it confounds two things which are clearly opposed to one another,—carelessness and design. It is on this principle that a mortgagee who omits to inquire for the title-deeds may be postponed to a merely equitable claim, although the case will be different, if a *bonâ fide* inquiry is made and a reasonable excuse is given for their non-production. (See the notes to section 78, *post*.)

There is, however, another class of cases in which a person may be affected with constructive notice of a fact by reason of his neglect of the usual or recognised means for acquiring such knowledge or notice. On this principle registration may be regarded as notice, but although

ACT IV OF 1882, SECTION 3.
 this seems to be so in America, and the doctrine has been adopted by the Bombay High Court, a different rule obtains in England. (*Procter v. Cooper*, 2 Drew., 1; *Hodgson v. Dean*, 2 Sim. and St., 221.) The propriety of this rule has been questioned by some learned Judges (see in passing, *Hine v. Dodd*, 2 Atkyns, 275), but the earlier decisions have been adhered to, perhaps, as a learned writer observes, more from its having become a rule of property than from a sense of its intrinsic propriety. (Story's Equity, section 402.) But registration will not be constructive notice of everything which may be contained in the memorial. If the memorial contains a recital, for instance, of another instrument or fact, it will not be notice either of such instrument or fact. (Kent's Comm., Vol. 4, Part VI, section 58.; cf. *Lackshman v. Dasrat*, I. L. R., VI Bom., 168.) The Allahabad High Court seems to follow a middle course, holding that a purchaser will be affected with notice of a registered instrument if he makes no inquiry or is unable to show that anything had been done to mislead him or to put him off his guard. (*Churaman v. Balli*, I. L. R., IX All., 591.)

'Constructive,' however, is a very elastic term, and eminent Judges have often said that the doctrine must not be extended. "Where a person has actual notice," says Lord Cranworth in *Ware v. Lord Egmouth* (4 D. M. & G., 460), "of any matter-of-fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice unless the circumstances are such as enable the Court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it, but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. (Cf. *In re A. W. Hall & Co.*, L. R., 18 Ch. Div., 712; *Hunter v. Walters*, L. R., 7 Ch. Ap., 75.)

Even in England where conveyancing is a science and title is deduced by an abstract and production of deeds, the doctrine of constructive notice is thought to have been pushed to its extreme limits. In this country, therefore, where the art of conveyancing is still in a rudimentary state, the doctrine must be applied with the greatest caution against a purchaser for value. (See the observations of Pontifex, J., in *Durganarain v. Baney*, I. L. R., VII Cal., 199.)

It is obvious that no rigid rule as to what will amount to gross or culpable negligence so as to meet every case can possibly be laid down. What constitutes gross negligence is always excessively difficult either to define, or by way of anticipation to illustrate (*per* Lord CRANWORTH in *Colyer v. Finch*, 5 H. L. R., Ca., 924). There is no absolute or intrinsic negligence. It is always relative to some circumstances of time, place, or person (*per* BRAMWELL, B., in *Degg v. Mid. Ry. Co.*, 1 H. & N., 781). It ought to be stated that the rigidity of the doctrine of constructive notice will be relaxed in countries possessing a system of registration of assurances. The observations of Lord Selborne in *Agra Bank v. Barry* (L. R., 7 H. L., 135) on this point deserve careful attention.

"It has been said in argument," observes the noble and learned Lord,

"that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these, the existence of a public registry in a country in which a registry is established by statute, must necessarily be very material. It would, I think, my Lords, be quite inconsistent with the policy of the Registry Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests (a). But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent." (Cf. *Doorga-narain v. Baney*, I. L. R., VII Cal., 199. Distinguish *Churaman v. Balli*, I. L. R., IX All., 591, where nothing had been done to mislead the purchaser or to put him off his guard.)

It may be added that possession by a third party is sufficient to put a purchaser on inquiry. It is, however, doubtful whether the rule extends to what is called constructive possession. (*Muncharji v. Kongseoo*, VI Bom. H. C. Rep., O. C., 59; *Nunjundepa v. Hemapa*, I. L. R., IX Bom., 10; *Hakeem v. Beejoy*, XXII Suth. W. R., 8; *Massim v. Shamdoss*, XXII Suth. W. R., 189; *Bibee Jeehunissa v. Umut Chunder*, XVII Suth. W. R., 151, *Muhammad v. Man Sing*, I. L. R., IX All., 125; where both possession and registration seem to have been relied upon. For the English law on the subject, see Sugden's Vendors and Purchasers, p. 762.) Similarly notice that the title-deeds are in the possession of another person may amount to notice of any claim which such person may have on the estate. (Sugden's Vendors and Purchasers, p. 762.)

Before quitting the subject of constructive notice, I ought to mention that the circumstances which should call prompt inquiry may be of infinite variety; but without laying down any general rule, it may be said that they must be of such specific character, that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to

(a.) The result of a system of public registration is, as Sir Henry Maine points out, that some intricate and difficult chapters of law cease to be of any importance. Early Law, p. 357.

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ACT IV OF some result. (*Ram Coomar Koondoo v. McQueen*, XVIII Suth. W. R., 1882, 166: XI Beng. L. Rep., 46.)

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I ought to add that the Indian Registration Act makes all instruments compulsorily registrable absolutely void if they are unregistered, and consequently sweeps away all equities arising out of them. (*Hicks v. Powell*, L. R., 5 Ch., 741.)

We now come to cases where notice is given to the agent of the person sought to be affected by it. Section 229 of the Contract Act says "any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal shall, as between the principal and third parties, have the same legal consequence as if it had been given to, or obtained by, the principal." This is a somewhat narrower rule than that laid down in some English cases, according to which the notice might be good, if it was clear that a previous transaction must have been present to the mind of the agent. (Sugden's Vendors and Purchasers, p. 757.) The rule is founded on grounds of convenience, and will not be departed from, even if it is shown that the agent is interested in not making the communication to his principal. The section does not say whether the rule is applicable in cases where the agent is a party to a scheme or design of fraud; but I apprehend that an exception will be made in cases where the information is withheld in pursuance of a conspiracy, although the mere fact of the interest and the duty of the agent being in conflict will not take the case out of the operation of the section. (*Kettwell v. Watson*, 21 Ch. D., 706, and see *Hormasji v. Mankuwarbhai*, XII Bom. H. C., 262; *Cave v. Cave*, 15 Ch. D., 644.) There is one peculiarity in respect of purchases without notice which ought to be noticed. It is settled law that, although a purchaser may be affected by notice, yet a person purchasing from him *bonâ fide* and without notice will not be bound by it. Similarly, a person with notice may safely purchase from a person who bought without notice. The reason for this apparently anomalous principle is that a *bonâ fide* purchaser without notice should be able freely and completely to dispose of the property innocently acquired by him. And on the same ground a subsequent purchaser, however remote, although with notice, will be protected. The *bonâ fide* purchaser of an estate for value, as it has been often said, purges away the equity from the estate in the hands of all persons claiming under him, with the exception, however, of the original party, whose conscience is affected by the notice. (*Dayal v. Jivraj*, I. L. R., 1 Bom., 237; *Raju v. Krishnarao*, I. L. R., 11 Bom., 273. For the English law on the subject, see Kerr on Fraud, 253. Sugden's Vendors and Purchasers, pp. 395, 753.)

It may be useful to state that where a plea of purchase for value without notice is set up, the defence must not only be specifically alleged but proved by the person who relies upon it. (*Philipps v. Philipps*, 4 D. F. & J., 209; *Att-Genl. v. Biphosphated Guano Co.*, 11 Ch. D., 327.) The denial of notice must be positive, and must state that there was no notice either at or before the execution of the deed or payment of the consideration-money. (Fisher's Mortgage, 552; but see *Chambers v. Howell*, 11 Beav., 6.) The foregoing rule, however, as regards the burden of proof, will not hold good where a person claims priority over another on the ground for instance that the latter took with notice of an earlier security. In such cases the onus of proving notice

lies on the person who seeks to enforce priority. (*Lalubhai v. Bai Amrit*, ACT IV OF 1882, I. L. R., II Bom., 299; and the authorities cited therein.)

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Enact-
ments
relating to
contracts to
be taken as
part of Act
IX of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872; and sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A).—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections "Transfer of Property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act (a). "Transfer of Property" defined.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force: What may be transferred.

(a.) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b.) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c.) An easement cannot be transferred apart from the dominant heritage.

(d.) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e.) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(a) This section is not very happily worded, and it may be argued that the expression transfer of property does not include a mortgage, but the argument rests on the assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. Ownership, however, is generally divisible, and the term transfer is properly applicable to any interest carved out of the aggregate known as ownership. See the Report of the Indian Law Commission, p. 32; see also the observations of Mahmood, J., in *Gopal v. Pursotam*, I. L. R., V All., 121.

ACT IV OF 1882, SECTION 6. (f.) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g.) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(h.) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

(i.) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee.

The first clause of this section lays down the rule of the English common law that there can be no valid transfer of property which is not in existence, actual or potential. But, although, there can be no valid transfer of such property so as to confer a right *in rem*, there may be a valid contract to transfer such property so as to operate, to use the language of English law, as an equitable assignment. It is true such an agreement, whether by way of absolute assignment or mortgage, cannot be enforced against a purchaser for value, but it is perfectly good as against the grantor and persons claiming under him otherwise than for value. The right created by such assignments is capable of being enforced by a decree for specific performance. In the case of *Holroyd v. Marshall* (10 H. L. Ca., 191; 33 L. J. Ch., 193), in the House of Lords in 1862, Taylor, who was the occupier of a mill, covenanted that he would assign to Holroyd his landlord all machinery which might thereafter be brought by him (Taylor) into the mill. The Sheriff seized the machinery which Taylor had so brought in, and Holroyd claimed it as equitable assignee. The House of Lords held that he was entitled to it.

Lord Westbury said “* * * It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, that the contract would in equity transfer the beneficial interest to the mortgagee immediately on the property being acquired. This of course assumes that the supposed contract is one of the class in which a Court of Equity would decree a specific performance. * * * It follows that, immediately on the new machinery and effects being

fixed or placed in the mill, they became subject to the operation of contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question." ACT IV OF 1882, SECTION 6.

It does not, however, follow that a charge on all a person's present and future personality will be operative as regards undefined property not belonging to the mortgagor at the date of the execution of the deed, as it might interfere with the mortgagor's power of maintaining himself. It would be impossible for the person either to get free or to obtain a fresh start in life. The invalidity of the charge as to after-acquired property will not, however, interfere with its validity as to the rest. There cannot, therefore, it seems, be a general mortgage of all future chattels. (*In re Count D'Epineuil*, 20 Ch. D., 758; *Belding v. Read*, 11 Jur. N. S., 547.)

The question was discussed by the Court of Appeal in the recent case of *Coombe v. Carter* (36 Ch. D., 348), when one of the learned Judges expressed a hope that the time would come when the Court of Appeal would have to lay down some more definite rule than we can gather from the cases since *Holroyd v. Marshall*. In giving judgment, Lord Justice Bowen observed with reference to the contention, that the contract was too vague to be specifically enforced. 'Vagueness' is a misleading term. A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced, the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a Court of Equity from enforcing the contract. Even then there may be something in the nature of the contract which will prevent its being enforced. I will not attempt to define what will have that effect. It is suggested that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a Court of Equity. Thus it is said a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision.

"A contract may, of course, be one of which a Court of Equity cannot decree specific performance, because it relates to nothing specific; *e.g.*,—a contract to supply a given quantity of goods of a particular description. That is a case where the subject-matter cannot be ascertained. And even where the subject-matter is ascertained, there may be cases where a Court of Equity will not interfere. The uncertainty of the subject-matter at the time when the contract is entered into does not seem to me an adequate ground, however, for declining to interfere if the subject-matter has become ascertained when the Court is asked to enforce the contract. I am aware that there may be an important distinction between a case where the contract is wholly executory and a case where the whole consideration has been paid. I only wish to say that in my opinion the subject is one of great difficulty, that it does not appear to me to have been exhaustively considered, and that there is a good deal of obscurity in the language often used about it. I retain the same doubts as I expressed in *Clements v. Matthews*, (11 Q. B. D., 808, 817)."

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6.

Lord Justice Fry added: "We have not to consider the cases where an assignment of future property is made effectual by what Lord Bacon calls '*novus actus interveniens*'. (See *Holroyd v. Marshall*, 2 D. F. & J. at p. 603; Bacon's Maxims.) There is another class of cases where an assignment of future property will have effect given to it as a contract to give a security on future property, namely, where the consideration has been received and the property has come into existence. That there are cases in which the Court will enforce such a contract is not in dispute. I think that there may be cases where the Court will not do so, owing to the nature of the subject-matter of the contract, and the authorities appear to indicate the existence of such a class of cases. *Belding v. Read* (3 H. & C., 955) indicates it, though I think, that in that case the Court drew a wrong boundary line, and were in error in holding that in such a case a Court of Equity would not decree specific performance. In *Official Receiver v. Tailby* (18 Q. B. D., 25), where the contract was indivisible, the Court held that it was one which could not be enforced, and I, considering myself bound by *Belding v. Read*, came to the same conclusion in *In re Count D'Epineuil* (20 Ch. D., 758.) There may, I think, be contracts of such a nature that the Court will not decree specific performance of them. It might say that a contract by a man to assign all his future property by way of mortgage was one which ought not to be enforced, because it would deprive the assignor of the means of livelihood, and would tend to a multiplication of actions for getting in the different parts of the property, which the assignor would be bound to assign from time to time. But in the present case we have not to draw the line between contracts which the Court will enforce and contracts which it will not. The cases where the contract is wholly executory on both sides differ materially from a case like the present, where the contract on one side has been performed. Wherever the boundary line is to be drawn, I am satisfied that the present falls within the class of cases where the contract will be enforced. It is a contract relating to several subject-matters, one being all real and personal estate to which the mortgagor may become entitled under any will. I can see no reason for not specifically performing that contract as to any property that comes to the mortgagor under a will. He has received the consideration and ought to perform his part of the contract. Such a contract was enforced by Lord Langdale in *Bennett v. Cooper* (9 Beav., 252), and though we are not bound by his decision, I think it one which ought to be followed." (Cf. *Bunsidhar v. Sant Lal*, I. L. R., X All., 133; *Misri Lal v. Mozhar Hossain*, I. L. R., XIII Cal., 262; *Lala Tilokdhari v. Furlong*, II Ben. L. Rep. A. C., 230; but see *Kedari v. Atmaram*, III Bom. H. C. Rep., A. C. J., 11, and the authorities cited therein.)

Although a bare expectancy cannot be transferred, a person may agree to assign to his creditor any legacy or other benefits which he expects to derive either from a specified person or even from his friends generally. The contract being one for value will bind the property if, and when, it is acquired. But before it comes into existence, it will remain only a contract by which the debtor is bound. (*Cook v. Field*, 15 Q. B., 460.)

It seems that the lien of the landlord on the crops of his tenant will override the claim of a transferee from the tenant; at any rate where the rent is in arrear and the assignee has notice of the fact. (*Kinloch*

v. *The Collector of Etawah*, I. L. R., III All., 433, and the case cited therein—*Clements v. Mathews*, 11 Q. B. D., 808, 812.)

I ought to mention that even if the contract is in form an absolute assignment, yet it would merely operate as a promised assignment until the contract attaches upon specific goods. (*Collyer v. Isaacs*, 19 Ch. D., 342.) A man cannot in equity any more than at law assign property which has no existence. But he may agree to assign property which is to come into existence in the future, and when such property comes into existence, equity acting upon a well-known principle fastens upon it, and the contract to assign thus becomes a complete assignment. (See *Rives v. Barlow*, 12 Q. B. D., 436; *Petch v. Tutin*, 15 M. & W., 110; *Leatham v. Amor*, 47 L. J. Q. B., 581.) The intention, however, to include after-acquired property must be clear and will not be inferred from doubtful expressions. (*Tappfield v. Hellman*, 6 M. & Gr., 245.) (a)

ACT IV OF
1882,
SECTIONS
7, 8.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

Persons
competent
to transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation
of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

This section illustrates the general rule that accessories follow the principal. An assignment of the debt generally draws after it the

(a) See *ante*, pp. 76, 90-91, 123-24.

ACT IV OF 1882, upon the rule, *omne principale trahit ad se accessorium*. But an assignment of the mortgage, without an assignment of the debt, is treated, at most, as a transfer of a naked trust. (Story's Equity, section 1023, note 5; Cavanagh on Securities for Money, 313; *Walker v. Jones*, L. R., 1 P. C., 50.) In the case of *Gunpat Roy* a distinction was drawn between an assignment of the debt itself and an assignment of a judgment obtained on the covenant; it is, however, open to doubt whether the distinction can be sustained, as the reasoning by which it is supported will apply equally whether the assignment is one of the debt or of the decree. (*Ganpat Rai v. Sarupi*, I. L. R., I All., 446.) See page 61, *ante*.

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

As regards mortgages, see section 59.

Condition restraining alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

A clause against alienation is frequently to be met with in mortgage-deeds in this country. Such a covenant by itself does not operate as a mortgage, and it would seem that where there is a valid mortgage, it gives no additional security to the mortgagee, the mortgagor being entitled notwithstanding the covenant to deal with the mortgaged property in any way that he thinks proper, subject, of course, to the right of the mortgagee to realize his security. In other words, such a transfer will be binding on the mortgagor or persons claiming under a puisne title, but not on the mortgagee. (*Radha Pershad v. Monohur*, I. L. R., VI Cal., 317; *Chunni v. Thakur Dass*, I. L. R., I All., 126; and Editor's note 128; *Mulchand v. Balgobind*, I. L. R., I All., 610; *Lachmin Narain v. Koteswar*, I. L. R., II All., 826; *Ram Saran v. Amrita*, I. L. R., III All., 369; *Ali Husan v. Dhirja*, I. L. R., IV All., 518; *Venkata v. Kannam*, I. L. R., V Mad., 184.) See also pp. 123-124, 155-158, *ante*.

Restriction repugnant to interest created.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner,

he shall be entitled to receive and dispose of such interest as if there were no such direction. ACT IV OF 1882, SECTIONS 12—16.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void. Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer or in the property. Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. Rule against perpetuity.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class. Transfer to class some of whom come under sections 13 and 14.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, Transfer to take effect

ACT IV OF 1882, SECTIONS 17—20. any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen, the interest shall pass to another person.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

ACT IV OF
1882,
SECTIONS
21-25.
—
Contingent
interest.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to
members of
a class who
attain a
particular
age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer
contingent
on happen-
ing of spe-
cified un-
certain
event.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to
such of cer-
tain persons
as survive
at some pe-
riod not
specified.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Condition-
al transfer.

ACT IV OF

1882,
SECTIONS
26, 27.*Illustrations.*

(a.) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b.) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c.) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d.) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Fulfilment
of condi-
tion prece-
dent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a.) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b.) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Condition-
al transfer
to one per-
son coupled
with trans-
fer to an-
other on
failure of
prior dis-
position.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a.) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b.) A transfers property to his wife; but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

ACTIVOR
1882,
SECTIONS
28—31.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-seven.

Uterior
transfer
conditional
on happen-
ing or not
happening
of speci-
fied event.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfilment
of condi-
tion subse-
quent.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Prior dis-
position not
affected by
invalidity
of ulterior
disposition.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

31. Subject to the provisions of section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition
that trans-
fer shall
cease to
have effect
in case spe-
cified un-
certain
event hap-
pens or
does not
happen.

Illustrations.

(a.) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

ACT IV OF 1882, SECTIONS 32—35. (b.) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Such condition must not be invalid. 32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Transfer conditional on performance of act, no time being specified for performance. 33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, time being specified. 34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

Election when necessary. 35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless, where the transfer is gratuitous, and the transferor

has, before the election, died or otherwise become incapable of making a fresh transfer,
 and in all cases where the transfer is for consideration,

ACT IV OF
 1882,
 SECTION
 35.

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultánpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be

ACT IV of 1882, not been done.
SECTIONS 36, 37.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be

performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

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1882,
SECTION
38.
—

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(a.) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. $7\frac{1}{2}$ to C, and Rs. $7\frac{1}{2}$ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b.) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

This as well as the preceding section would seem to be applicable to transfers by way of mortgage.

B.—Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer
by person
authorized
only under
certain cir-
cumstances
to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from A.

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SECTION 39.

As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Illustration.

A, a Hindu, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith without notice of the agreement, B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

See *ante*, pp. 331-333.

This section contains a very important provision applicable to a Hindu widow's claim for maintenance. It has been asked, does it constitute an equitable lien? and if so, does it bind the estate in the hands of a *bonâ fide* purchaser for value? Would notice of the mere existence of a right to maintenance be sufficient to bind the purchaser, or must it be notice of the existence of a charge actually created and binding the estate, in other words must it be notice of a claim which has actually matured into a lien? The whole law on this subject, which is certainly in a somewhat tangled state, is reviewed by Mr. Justice West in the case of *Lakshmen v. Sattya-bhama* (I. L. R., II Bom., 494,) and in which the following propositions are formulated:—

(i.) The mere circumstance that the purchasers had notice of her claim, is not conclusive of the widow's rights against the property in their hands.

(ii.) If the property were sold in order to pay debts (not incurred for immoral purposes) of her husband, or his father, or grandfather, or for the benefit of the undivided family, or to satisfy a former decree obtained by the plaintiff herself against the same defendant for maintenance, such sale would be valid against her, whether or not the purchasers had notice of her claim.

(iii.) The debts of the deceased owner take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts.

(iv.) By a sale of the property, the sons cannot evade a personal liability to provide for the widow.

(v.) If a mother, foregoing her claim to a separate provision out of the paternal property, resides with her sons or step-sons, and is maintained by them, she must submit to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims, will not be supported, but the particular assignee for value acquires a complete title.

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1882,
SECTION
39.
—

(vi.) In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family, her claim being strictly to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith.

(vii.) If there is an ample estate left, out of which to provide for the widow, or if, knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parcener, if she lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing, to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance.

(viii.) The knowledge of collateral rights created by agreement, in equity frequently qualifies those acquired by a purchaser, the widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable.

(ix.) Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser, is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased, is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim; from the first the relations of the parties are determined once for all at the moment of the sale.

(x.) There is no authority for the doctrine which makes the claim of widows not entitled to a share of property in case of partition, a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit.

(xi.) The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal position. The rights and obligations of the original co-parceners fall at last to

ACT IV OF 1882, SECTIONS 40—42. the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted some widow's claim into an actual right in re. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the vendor's family. (*Lakshman Ramchandra Josi v. Sottiyubhama Mabai*, I. L. R., II Bom., 494. See Mayne's Hindu Law, secs. 418—421.)

The protection, it will be observed, enjoyed by a person who has a right to receive maintenance or a provision for advancement or marriage is very similar to the right of a creditor to follow the assets of a deceased debtor. (*Greender v. Mackintosh*, I. L. R., IV Calc., 897; *Bazayet Hossein v. Dooli*, I. L. R., IV Calc., 402.)

Burden of obligation imposing restriction on use of land,

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

or of obligation annexed to ownership, but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultánpur to B. While the contract is still in force, he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

Transfer by ostensible owner.

41. Where with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by person having authority to revoke former transfer.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another trans-

feree, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

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1882,
SECTION
43.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Transfer
by unau-
thorized
person
who subse-
quently
acquires
interest in
property
transfer-
red.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option (a).

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

This section, while substantially following the English law on the subject of title by estoppel, is free from the technicalities in which it is entangled in the English law, and which have brought upon the rule the reproach that it treats a fictitious statement as true, 'falsehood being made to have the effect of truth.' According to the English law, the words of the covenant must be clear and unambiguous that the covenantor has the legal estate. A mere covenant that he has the power to convey will not do, and it is even doubtful whether a covenant will do at all, and whether there must not be a positive statement. (*General Finance &c. Co. v. Liberator &c. Co.*, 10 Ch. D., 15; *Heath v. Crealock*, L. R., 10 Ch., 30). According to the provisions of this section, a bare representation will be sufficient to create a title by estoppel. (*Radhey v. Mahesh*, I. L R., VII All., 864.) Then, again, there is another very material distinction between our law and the English law. The right conferred by this section may not be enforced against *bonâ fide* purchasers for value and without notice

(a) Although the section speaks of erroneous representations, it is clear that it includes fraudulent misrepresentations.

ACT IV OF 1882, the very strong observations made by the Master of the Rolls in the case to which I have just referred. I may notice in passing that this section contains a legislative reversal of the decision of the Allahabad High Court in the case of *Mahomed v. Karamut* (IV All. H. C. Rep., 11.)

It is scarcely necessary to observe that the right of a mortgagee to treat the after-acquired property as subject to his security can be exercised only as long as the relation of mortgagor and mortgagee lasts. (See *ante*, pp. 100—102.)

Transfer
by one co-
owner.

44. Where one or two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwellinghouse belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

The provisions of this section would seem to be applicable to transfers by way of mortgage.

Joint
transfer
for con-
sideration.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interest to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

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1882,
SECTIONS
46—48.

Transfer
for con-
sideration
by persons
having dis-
tinct in-
terests.

Illustrations.

(a.) A, owning a moiety, and B and C, each a quarter share of mauza Sultánpur, exchange an eighth share of that mauza for a quarter share of mauza Lálpara. There being no agreement to the contrary, A is entitled to an eighth share in Lálpara, and B and C each to a sixteenth share in that mauza.

(b.) A, being entitled to a life-interest in mauza Atralie and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Transfer
by co-own-
ers of share
in common
property.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultánpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of
rights
created by
transfer.

This is only a paraphrase of the maxim *qui prior est tempore potior est jure*, but such priority may be forfeited in various ways (section 78), while the rule itself is subject to exceptions both statutory and otherwise (Lecture XII, *ante*. See also notes to secs. 78-79, *post*.)

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1882,
SECTIONS
49—51.

Trans-
feree's
right un-
der policy.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

The provisions of this section are apparently based on the judgment of Lord Justice James in *Rayner v. Preston* (18 Ch. D., 1.) As pointed out by the learned Judge the proposition formulated in this section is not only based on, what may be called, 'the natural equity which commends itself to the general sense of the lay world, not instructed in any legal principles,' but also on 'artificial equity' as it is understood and administered in the English system of jurisprudence.

The rights and liabilities of mortgagees in connection with insurance are dealt with in secs. 72 and 76 of the Act.

Rent *bonâ fide* paid to holder under defective title.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Improvements made by *bonâ fide* holders under defective titles.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

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1882.
SECTION
52.

Transfer
of property
pending
suit relat-
ing there-
to.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

See *ante*, pp. 396-97.

The doctrine of *lis pendens* was thought at one time to rest on the principle of constructive notice, but it now rests upon a surer foundation. "It would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The plaintiff would be liable to be defeated in every case by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceedings." (*Bellamy v. Sabine*, 1 DeG. & J., 566.)

The question in dispute must relate to an interest in land, and not merely to money secured upon it. (*Worsley v. Ld. Scarborough*, 3 Atk., 392; *cf. Jennings v. Bond*, 2 Jo. & Lat., 720. See also the recent case of *Price v. Price*, 35 Ch. D., 297; *cf. Wigney v. Wigney*, 7 P. D., 228.) It is sometimes said that *lis pendens* is not in itself notice for the purpose of postponing a registered instrument, and the dictum of Sir William Grant in *Wyatt v. Barwell*, 19 Ves., 435, is cited for the purpose. (See also *Wallace v. Donegal*, 1 Dr. & Wal., 461.) The dictum, however, rests on the notion that *lis pendens* operates only by way of notice, but this has now ceased to be recognised as the true basis of the principle of *lis pendens*. An alienation therefore by a registered instrument *pendente lite* will not carry priority with it. (See *Lakshman v. Dasrat*, I. L. R., VI Bom., 168; and cases cited therein.) It seems, however, that if the plaintiff in the action has only a defeasible estate, the defendant is at liberty to put an end to it and thus defeat the plaintiff's right. (Sugden's Vendors and Purchasers, 759.)

It ought to be mentioned that, although a purchaser is not bound by the equities of a co-defendant to which it is not necessary to give effect for the purposes of the suit, he will take subject to the interests of the defendants *inter se* which naturally arise out of the rights of the plaintiff. (*Tyler v. Thomas*, 25 Beav., 47; *Bellamy v. Sabine*, 1 DeG. & J., 566.)

In this country *lis pendens* takes effect from the service of the summons. (*Radhasham v. Shivu*, I. L. R., XV Calc., 647) (a). It

(a) As to the law in England on the subject, see Coote's Mortgage, 864; Fisher, p. 550.

ACT IV OF 1882. SECTION 52. — seems that an appeal would be regarded as a continuation of the *lis* so as to bind a purchaser. In a recent case where the property was sold by the defendant while the action was pending in the original Court, it was held that the purchaser was bound by the judgment of the Court of appeal, although the judgment of the original Court was against the plaintiff and the purchaser was not a party to the proceedings in appeal. (*Govind Chunder Roy v. Gooroo Churn Karmakar*, I. L. R., XV Calc., 94.) This, however, would seem to be carrying the doctrine too far. (See the Judgment of Glover, J., in *Chunder Kumar Lahiri v. Gopi Kisto Gossamy*, XX Suth. W. R., 204; D. N. Mitter, J., dissented, relying upon the dictum of Lord Redesdale in *Gore v. Stackpole*, 1 Dew, 31; but see Sugden's Vendors and Purchasers, 758; 16 Ves., 213.) An appeal in this country does not operate as a stay of proceedings, and it seems to me that a judgment does not cease to be final, simply because if it were reversed on appeal, the successful party would be entitled to a writ of restitution. The finality of a judgment is not affected by the fact that an appeal will lie from it to a superior Court, and to hold a purchaser bound by the proceedings in appeal to which he is no party, although the judgment of the original Court was in favour of his vendor would seem to be pushing the doctrine to a point at which it ceases to be useful. The law on the subject is thus stated in Fisher's Mortgage, p. 549:—"It may be observed, with respect to appeals from the Court below, either to a superior jurisdiction there or to the House of Lords, that an order for an appeal seems not to be a continuation of the *lis pendens*, because, as a general rule, the appeal puts no stop to the proceedings under the decree. The *litis contestatio* is assumed to be at an end, until the decree is varied or reversed. And the same practice prevails in the House of Lords, which seems to be a strong argument against the continuation of the *lis pendens* during the appeal. Of course, if the registration be allowed to drop during the period allowed for appeal, the question will not arise." (See also Coote's Mortgage, p. 863.) It ought to be added that in England the pendency of an appeal cannot be pleaded as a defence to an action on a judgment—Bullen and Lenke, Part II, p. 233. The principle of *lis pendens* must be applied with the greatest caution in this country, not only because there is no law for the registration of a *lis pendens*, but also because there is much danger of secret collusion. (See the observations of their Lordships of the Privy Council in *Tarakant v. Puddomoney*, X Moore's Ind. App., 476.)

It will be observed that the section in terms deals only with voluntary alienations (a), but it must not be supposed that the principle is confined to such alienations. It is true that there is a conflict of opinion on the point; but the weight of authority seems to be in favour of the extension of the doctrine to alienations *in invitum*. (*Govind Chunder Roy v. Gooroo Charan Karmakar*, I. L. R., XV Calc., 94, and cases cited in the report; *Lakshman v. Dasrat*, I. L. R., VI Bom., 168, and cases cited therein) (b).

In conclusion, it is necessary to state that, an alienee is not bound by any order whatever that may be made in the suit, but only by

(a) Cf. section 2, clause (d).

(b) In the case of *Nilakant v. Shuresh* (I. L. R., XII Calc., 414), their Lordships of the Privy Council express strong doubts as to the correctness of confining the principle to voluntary alienations.

proceedings which, from the nature of the claim and the relief prayed for, he might expect would take place. (*Kailas v. Foolchand*, VIII Beng. L. Rep., 474; *Kasimunnissa v. Niralna*, I. L. R., VIII Calc., 79; IX Calc. L. Rep., 173; X Calc. L. Rep., 113.)

I ought to mention that, to constitute *litis pendentia* as observed by Lord Lyndhurst, L. C., in *Kinsman v. Kinsman*, (1 R. & M., 622), there must be *litis contestatio*; therefore if the suit be ended by decree or otherwise, there is no *lis pendens* to affect the land. The matter then becomes *res judicata*. In the case of a sale by a mortgagee under a decree, the proceedings for the purposes of *lis pendens* must, however, be taken to continue till the property is actually sold. (*O. A.*, No. 104 of 1883, *Mathurakanta Shah Chowdry v. Anund Mohun Doss*, Calc., unreported.)

In addition to the cases cited above, as well as at p. 396, *ante*, the following cases may be referred to on the question of *lis pendens*. (*Bull v. Hutchins*, 32 Bear., 615; *Gourmani v. Reed*, 2 Tay. & Bell, 83; *Umamoyi v. Tarini*, VII Suth. W. R., 225; *Amundmoyi v. Dhanendra*, I Suth. W. R., 103; S.C., on appeal, XVI Suth. W. R., P. C., 19; VIII Beng. L. Rep., 122; *Traquebarsami v. Ammai*, VI Mad. H. C. Rep., 238; *Indurjeet v. Postie*, XIX Suth. W. R., 197; *Fruval v. Sanagapalli*, VII Mad. H. C. Rep., 104; *Rajkishen v. Radhamadhob*, XXI Suth. W. R., 349; *Jharoo v. Rajchundra*, I. L. R., XII Cal., 299; *Ali Shah v. Husain*, I. L. R., I All., 588; *Nuffur v. Ramlal*, XV Suth. W. R., 368; *Kali Prosad v. Buli Singh*, I. L. R., IV Calc., 789; III Calc. L. Rep., 396; *Lalu Mulji v. Kushi Bai*, I. L. R., X Bom., 400; *Balaji v. Kushalji*, XI Bom. H. C. Rep., 24; *Bazayet v. Dooli*, I. L. R., IV Calc., 402; *Sheo Ratan v. Chotay*, I. L. R., III All., 647; *Sam v. Apundi*, VI Mad. R. C. Rep., 75; *Bissonath v. Radha*, XI Suth. W. R., 554; *Luchmin v. Koteswar*, I. L. R., II All., 826; *Nilakanth v. Suresh*, I. L. R., XII Calc., 418; *Bhagwan v. Nathu*, I. L. R., VI All., 444; *Pranjivan v. Bajji*, I. L. R., IV Bom., 34; *Chundernath v. Nilakanth*, I. L. R., VIII Calc., 690; *Parvati v. Kisan Singh*, I. L. R., VI Bom., 567; *Sadasiva v. Sabâpathi*, I. L. R., V Mad., 106; *Anand v. Panchilal*, V Beng. L. Rep., 703; *Ram Chandra v. Mahadaji*, I. L. R., IX Bom., 141; *Brahmanayaki v. Krishna*, I. L. R., IX Mad., 92; *Radhika v. Radhamani*, I. L. R., VII Mad., 96; *Bhuggobutty v. Shamachurn*, I. L. R., I Calc., 337; *Bhanoomutty v. Prem Chund*, XV Beng. L. Rep., 28; *Kondi Munisami v. Dakshanamurthi*, I. L. R., V Mad., 371; *Rambhat v. Lakshman*, I. L. R., V Bom., 630; *Azim-unnessa v. Dale*, VI Mad. H. C. Rep., 455; *Fuzeelun v. Omdah*, X Suth. W. R., 469; *Digambari v. Eshan*, XV Suth. W. R., 372; *Puluck v. Mohabeer*, XXIII Suth. W. R., 382; *Ramlachan v. Ramnarayan*, I Calc. L. Rep., 296; *Krishnapa v. Bahiru*, VIII Bom. H. C. Rep., A. C. J., 55; *Guzee-ood-deen v. Bhochun*, II Agra H. C. Rep., 301; *Ramsaran v. Omirta*, I. L. R., III All., 369; *Karoo v. Dataram*, S. D. A., 1857, p. 953; *Sheobuksh v. Sheochurn*, S. D. A., 1858, p. 498; *Woomasundari v. Rughounath*, II S. D. A., 1860, p. 35; *Hurruch v. Mohamed*, S. D. A., N. W. P., 1853, p. 372.)

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors

Fraudulent transfer.

ACT IV OF 1882. of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

SECTIONS
54, 55.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

"Sale"
defined.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how
made.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument (a).

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract
for sale.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Rights
and liabilities
of
buyer and
seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property, sold :

(1) The seller is bound—

(a) This clause would seem to render the registration of the transfer of a mortgage of immoveable property compulsory whatever may be the value of the property or the amount of the mortgage; (distinguish *Kalka v. Chandan*, I. L. R., X All., 20.)

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SECTION
55.

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer

ACT IV of all documents of title relating to the property which are
1882. in the seller's possession or power :

SECTION
55.

— Provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

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SECTION
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—

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent (a).

See *ante* pp. 322—325.

The lien of the vendor, and the same observation applies to the lien of the vendee, is sometimes rested in English law on the ground of an implied contract between the parties. But the lien may more properly be said to arise independently of contract. In the case of *Kettlewell v. Watson* (26 Ch. D., 501), where it was contended that the vendor's lien could not be enforced against a purchaser from the vendee if no memorial of the lien is registered, Lord Justice Lindley in delivering the judgment of the Appeal Court observed:—"The *prima facie* right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase-money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase-money is not duly paid. There is no necessity for the vendor to stipulate for the lien; and although the lien arises from, and may in one sense be said to be created by, the contract of sale, still no contract conferring the lien is necessary, and in that sense the lien may be said to arise independently of contract. No contract to confer the lien being necessary, it follows that where it is not in fact conferred by a written document, there is no instrument creating it, a memorial of which can be regis-

(a) In addition to the cases cited in page 325, *ante*, see *Yellappa v. Mantappa*, III Bom. H. C. Rep., 102.

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tered under the provisions of the statute of Anne (2 & 3 Anne, c. 4). The vendor's lien is in this respect like a deposit of deeds as a security for a loan without any memorandum or document showing the purpose of deposit. *Sumpter v. Cooper* (2 B. & Ad., 223) decided that the statute does not apply to a security so created, and no other decision would be in accordance with the language of the Act. Such cases are not provided for by the Statute, and it is not competent for this or indeed any Court to hold a transaction to be within the provisions of a statute, when its language clearly does not apply to the transaction in question. We are unable, therefore, to accede to the contention that in this case the vendor's lien must be negatived simply on the ground that no memorial of it was registered. The answer to that question is, there was no document of which a memorial could be made.¹

It is necessary to state that the lien may be claimed not only by the vendor, but also by a third person advancing the purchase-money. (*Driving v. Frost*, 3 My. & Cr., 673, where, however, there was a deposit of title deeds. *Meeson v. Clarkson*, 4 Ha., 97.) The lien of the vendee may also extend to the costs of a suit to compel specific performance of the contract. (*Turner v. Marriot*, 3 Eq., 744.) A similar right is also recognised in favour of a sub-purchaser upon the interest acquired by the vendee by part payment of the purchase-money. (*Aberaman Iron Works v. Wickens*, 4 Ch. D., 101). The purchaser may claim a lien on the purchase-money if he is evicted from the property, but, of course, this right cannot be exercised if the money is not earmarked. I ought to mention that in one case the lien was held to extend to advances made by the vendor for improvements. (*Exp. Linden*, 1 M. D. & D., 428.) If, however, a person enters into a contract to expend a certain sum of money on land, and after spending part of it declines to perform the contract, he acquires no lien on the land for the money which he has expended. (*Wallis v. Smith*, 21 Ch. D., 243.) The lien being merely equitable will not bind a purchaser without notice. As the lien rests on a quasi-contract, it may be waived by the parties either expressly or impliedly, but the lien is not lost unless there is a clear expression of the intention of the parties that it shall not subsist. But the taking a distinct security is always *prima facie* evidence of a waiver of the lien (see the notes to *Mackreth v. Symmons*, White and Tudor's L. C., Vol. I., p. 379). It is needless to add that no lien will arise either in favour of the vendor for the unpaid purchase-money or of the purchaser for his advances if the contract is not completed by reason of his own act or default.

Sale of one
of two
properties
subject to
a common
charge.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend (a).

See *ante*, pp. 350—353.

This section which is based on the English law rests on the notion that the vendor *prima facie* conveys to the purchaser not simply the equity of redemption but the property itself, free from any liability

(a) Compare clause (g), section 55, *supra*.

to contribute to the mortgage-debt (see cl. g., sec. 55). It would seem that in England notice of the charge by the purchaser would make no difference in the application of this rule. It seems also that the right may be exercised as against a subsequent innocent purchaser of the remaining property which would therefore have to bear the entire burden of the charge (Dart's Vendors and Purchasers, p. 944). In Sugden's Vendors and Purchasers (p. 746), the law is however thus stated:—
 "In a case in Ireland (referring to *Hartley O'Flaherty*, Beat., 61), where Sir A. Hart and Lord Plunket differed in opinion, in the result they appear to have agreed, that where there is a concealed incumbrance, as a judgment, a purchaser of a portion of the estate cannot be compelled to contribute by a later purchaser of another portion. And the rule was considered to apply equally to the case of a mortgage of the whole estate.

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"It has since been decided, that whether there is upon the first sale a mere concealment of the judgment, or, *a fortiori*, if there is a declaration or covenant that the estate is free from incumbrances, the first purchaser is entitled to be relieved against the seller and later judgment-creditors claiming under him, so that the estate unsold must bear the whole of the prior judgment-debt, as well as its own subsequent incumbrances. *But this does not touch the question between several innocent purchasers.*"

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court

Provision
by Court
for incum-
brances,
and sale
freed
therefrom.

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons

ACT IV OF 1882.
SECTION 57.
— to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

This section which is drawn on the lines of section 5 of the English Conveyancing Act, 1881, arms the Court with a power which it did not previously possess. As the law stood before the passing of the Act, no land subject to an incumbrance could be sold free from it without the consent of the incumbrancer. Under this Act a different form of security may be substituted for the land. A mortgagee may also, contrary to the general rule, be redeemed before the mortgage-money is payable, but in such cases compensation will probably be allowed to the mortgagee for anticipating the payment, as also for any loss which may be sustained by him by reason of the transmutation of the security. Although the section allows a mortgagee to be redeemed in his absence, it can be done as a rule only in those cases where it is impossible to communicate with him. It is unfortunate that the word incumbrance is not anywhere defined in the present Act. In the corresponding English Act, it includes a mortgage in fee or for a less estate and a trust for securing money and a lien and charge of a portion annuity or other capital or annual sum. The section provides for two classes of cases, one where an annual or monthly sum is charged on a property or a capital sum is charged on a determinable interest in the property, and the other where a capital sum is charged on the property. A determinable interest in the property would seem to point to a partial interest carved out of some other estate, where the whole is sold together; for example, in the case of a sale by a tenant for life and the remainderman, where there is a mortgage of the life estate, the dividends

will represent the income to which the incumbrancer of the tenant for life is entitled during the latter's life; and the investments will represent what the remainderman is entitled to after the determination of the life estate.

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1882.
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57.

For a form of order made in a case where the property was subject to an annuity, see *Patching v. Bull* (30 W. R., 244). For a form of order under the corresponding English section in an action to which the incumbrancer is not a party, see *Dickin v. Dickin* (30 W. R., 887).

It seems that the Court cannot be called on to act under this section where the incumbrance or rent-charge exceeds the value of the land. In the recent case of *G. N. Ry. and Sanderson* (25 Ch. D., 788), where the question arose under the corresponding section of the English Act, Pearson, J., in giving judgment observed:—"The question is, whether, under section 5 of the *Conveyancing Act*, I have power, or, at any rate, whether I ought, to compel the Company to take the necessary steps to release the land from the rent-charge. Section 5 is only permissive in its language. It says that 'the Court may, if it thinks fit . . . direct or allow payment into Court' of the amount mentioned, 'and the Court may, if it thinks fit . . . declare the land to be freed from the incumbrance.' In the present case, the sum which would have to be paid into Court would be about £2,300. The first question is, whether section 5 applies at all to a case of this kind, and I am rather disposed to think that it does not. I am not asked by the vendors to make use of the power conferred by this section, but I am asked by the purchaser to say that the vendors ought to apply to the Court to make use of that power, when the vendors do not wish that the Court should do so. I think that, when it is said that the Court may '*direct or allow* payment into Court,' the word '*direct*' applies to a sale by the Court, and the word '*allow*' to a sale out of Court. The rent-charge is secured on the land by an Act of Parliament, and I have great difficulty in saying that section 5 of the *Conveyancing Act* applies at all to such a case, so as to enable me to take away from the persons who are entitled to the rent-charge that which the other Act has given them, without their consent, and, indeed, without any notice to them. I should hesitate a long time before I could come to such a conclusion. But, supposing that, upon the application of the vendors, I could declare the land free from this rent-charge, what I have to consider is, whether, where the vendors make no such application, I ought to insist on their doing so, when they would have to pay into Court a sum very considerably in excess of the purchase-money of the land. I am not aware that the Court has ever said that a vendor is not entitled to rescind a contract, when the contract contains a provision such as that which is contained in the present contract, and when the result of his not rescinding would be to impose on him terms which he never contemplated, and never could have contemplated, and which if he was not a rich man, would inflict on him the greatest possible hardship. In my opinion, my decision ought not to depend on the length of the vendor's purse. In the case of any ordinary vendor, I think I should have declined to order him to pay into Court a sum very nearly three times the amount of his purchase-money, and the fact that the vendors are a wealthy company, ought not, in my opinion, to make any difference. I think that the Company are entitled to rescind the contract, unless the purchaser is willing to waive his requisition."

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1882,
SECTION
58.

CHAPTER IV.
OF MORTGAGES OF IMMOVEABLE PROPERTY AND
CHARGES.

"Mort-
gage,"
"mort-
gagor"
and
"mort-
gagee"
defined.

58. (a.) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple
mortgage.

(b.) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage
by condi-
tional sale.

(c.) Where the mortgagor ostensibly sells the mortgaged property—

on condition that, on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or

on condition that, on such payment being made, the sale shall become void, or

on condition that, on such payment being made, the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale (a).

Usufruc-
tuary
mortgage.

(d.) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money,

(a) *Qy.*—Would a mortgagee under a conditional sale, containing a covenant to pay, be entitled to a decree for sale?

the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

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SECTION
58.

English
mortgage.

(e.) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage (a).

The words 'transfer of an interest' in the definition of a mortgage have given rise to a good deal of discussion in connection with what are called hypothecations or simple mortgages. It has been said that an essential of a mortgage, except an equitable mortgage, is that some estate in the lands shall be transferred by the mortgage to the mortgagee, and Coke on Littleton and Bacon's Abridgment have been cited for the proposition (*Rangasami v. Muttukumarappa*, I. L. R., X Mad., 509). It seems to me, however, with great deference that a reference to English authorities on the point is likely to be misleading. The definition of the word mortgage in the English law as pointed out by Mahmood, J., has not been always accepted as applicable to pledges of land in this country; the word mortgage being habitually used to denote equitable liens as well as mortgages properly so called, and the Legislature in cl. b seems to use the expression in its larger sense, for it is quite clear that in a simple mortgage no estate passes to the mortgagee. He acquires only a right which has been described as a right in *in re aliena*. "The right of sale," says Professor Holland, "is one of the component rights of ownership, and may be parted with separately in order thus to add security to a personal obligation. When so parted with it is a right of pledge, which may be defined as 'a right *in rem*, realisable by sale, given to a creditor by way of accessory security to a right *in personam*.'" Holland's Jurisprudence, p. 187. According to the theory of the English law, a power of sale is nothing but an authority to defeat the equity of redemption, and when the mortgagee sells, he transfers the legal estate not by means of a power but by virtue of his legal ownership (*In re Harwood*, 35 Ch. D., 470). In the case of a simple mortgage in this country, the practical result is the same so far as the purchaser is concerned. But it is reached by a different process.

The authorities, it would seem, are also not quite consistent as to whether in order to constitute a simple mortgage, the power of sale should be one given to the lender himself, or whether it may not be exercised by the Court on behalf of the mortgagee. (See in addition to the cases cited in Lec. IV, p. 125; *Rangasami v. Muttukumarappa*, I. L. R., X Mad., 509; *Aliba v. Nanu*, I. L. R., IX Mad., 218). It is

(a) Where the deed contains no covenant to repay, the loan may be recovered as a simple contract-debt. (*Yates v. Aston*, 4 Q. B., 182; *Mathews v. Blackmore*, 1 H. & N., 762.) A covenant, however, may be sometimes implied from a mere acknowledgment of the debt in the deed. The definition would, however, seem to exclude a well-known class of securities; I mean mortgages by trustees under a power, where there is no *cestui que trust* to enter into the usual covenants.

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58.

said in the latter cases that the distinction between a simple mortgage and a charge consists in this, *viz.*, where a power of sale is conferred upon the mortgagee to be exercised by him without the intervention of the Court the transaction is a mortgage, otherwise it only creates a charge. I may, however, be permitted to observe that this view of a simple mortgage is hardly consistent with the words 'cause to be sold,' or with the provisions of section 69 of the Act. It is also inconsistent with the acknowledged right of a simple mortgagee to bring an action for sale. The truth seems to be that the expression 'simple mortgage' long familiar to us in Bengal and the North-West was almost wholly unknown in other parts of the country, and the Courts there have felt a natural reluctance to extend the definition to hypothecations generally, when the result of it might be that a pledgee of land instead of only twelve years would have the somewhat unreasonably long period of sixty years to enforce his security. It has been sought to avoid this result in various ways; for example, by borrowing the definition of a mortgage from the English law or by limiting the term 'simple mortgage' only to those cases in which the power of sale may be exercised by the mortgagee himself, without the intervention of the Court. It has also been denied that the word 'mortgage' has the same meaning in the Limitation Act and in the Transfer of Property Act; while a suggestion has also been thrown out that the statutory definition does not apply to past transactions. It has also been said that the mere use of the word 'pledge' is not sufficient (a), nor even a covenant that in default of payment the property should be sold to the creditor for the amount of the debt. (*Cheti v. Sundaram*, II Mad. H. C. Rep., 51.)

The whole difficulty, as I have already observed, has been created by including under the name of 'mortgage' securities which although known in these parts by the name of 'simple mortgage' were known in Madras and other places under the classical name of 'hypothecation,' or the more modern English designation of equitable liens or charges. The definition contained in the Act is, however, as pointed out by Mr. Justice Straight, only a crystallisation of the principles enunciated in the decisions of the Calcutta, as well as of the Allahabad High Court. (See among other cases *Khub v. Kulian*, I. L. R., I All., 240; *Phul Kuar v. Murlidhar*, I. L. R., II All., 527; *Badri v. Daulat*, I. L. R., III All., 706; *Piari v. Khiali*, I. L. R., III All., 857; *Ramdin v. Kalka*, I. L. R., VII All., 502). I am, however, bound to add that simple mortgages in some at least of these cases are also spoken of as charges, and a broad line between the two has been for the first time drawn by the Transfer of Property Act. The effect of the Act, however, will not be to convert a simple mortgage into a mere charge, but only to render the latter expression inapplicable to a simple mortgage.

The question whether a particular transaction amounts to a mortgage or only to a charge has generally arisen in connection with Arts. 132 and 147 of the Statute of Limitations, but the point may also be of importance when such transactions are sought to be enforced against *bonâ fide* purchasers without notice, as there is in

(a) Although the contract may have been entered into with a knowledge of, or even with reference to, the usual practice of the Courts to direct a sale of the pledge in such cases.

this respect an important difference between a mortgage and a mere charge (a). ACT IV OF 1882.

The words 'specific immoveable property' in clause (a) may also give rise to difficulty. In the recent case of *Ram Sidh v. Balgovind* (I. L. R., IX All., 158), where the borrower pledged his 'wealth, and whatever property he had' to his creditor, the Court was of opinion that the property was sufficiently specific, as it included all the property of the debtor, and in support of this view the judgment of Mr. Justice Fry in the case of *Tadman v. D'Epineuil* (20 Ch. D., 758), was cited. (Cf. *In re Clarke*, 35 Ch. D., 109, which, however, goes further than the judgment in the last mentioned case. See also *Manick v. Beharee*, II All. H. C. Rep., 263.) The section, however, will not prevent a transfer of after acquired estates from being treated as an agreement. SECTION 58.

Although the mortgagee acquires an interest in the property, the ownership, it must be remembered, resides in the mortgagor. In *Saadut Alee Khan v. The Collector of Saron* (S. D. A., 1858, p. 840,) the Court in speaking of usufructuary mortgages observed: "The right of ownership in the mortgaged property does not pass to the mortgagee, leaving only the equity of redemption to the mortgagor. The right of ownership together with the right of redemption, remained with the mortgagor, and until the property is actually foreclosed and the sale becomes absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales or usufructuary mortgages; it follows that the mortgagees in the present case, who, whatever the nature of the mortgage, were in possession, were simply usufructuaries and as such enjoyed no right of ownership. Such being the case, the registration of their names incorrectly as proprietors, or the entrance of their names in the sale advertisements as such, when, in fact, and admittedly they were no such thing, cannot alter the nature of the rights or convert a lower into a higher title." (Cf. *Gopal v. Parsotam*, I. L. R., V All., 121; *Sheoratan v. Mahipal*, I L. R., VII All., 258. Distinguish *Indar v. Naubat*, I. L. R., VII All., 553.)

The section speaks of 'principal money and interest.' It would, however, seem that an allowance to the mortgagee in the nature of interest for the retention of the debt would be regarded as part of the mortgage-money. As I have already stated, when a person borrows money for a certain period and agrees to pay interest at a certain rate down to the day named, no contract for payment of interest at such rate after the day named, or indeed for the payment of any interest at all will be implied. The creditor, however, may claim compensation, and, as a rule, the amount of damages for the non-payment of a debt is regulated by the usual commercial value of money. In England, five per cent. is generally allowed, while in this country, six per cent. is not unfrequently awarded; although it is notorious that the value of money is higher. (In addition to the cases cited at pp. 126-127, *ante*, see *Mansub Ali v. Gulab Chand*, I. L. R., X All., 85; followed in S. A. No. 1292 of 1887, Calcutta. *Deen Doyal v. Het Narain*,

(a) It seems, however, that a hypothecation may be enforced in Madras even against a purchaser without notice (*Golla v. Kali*, IV Mad. H. C. Rep., 434; *Sadagopal v. Ruthna*, V Mad. H. C. Rep., 457; Cf. *Anna v. Narran*, I Mad. H. C. Rep., 114; *Chetti v. Sundar*, II Mad. H. C. Rep., 51.)

ACT IV OF I. L. R., II Calc., 41; *In re Roberts*, 14 Ch. D., 49; in which case, 1882. however, Lord Justice Cotton suggests that there may be a distinction SECTION 59. between a suit for redemption and an action brought for breach of covenant to pay the money on a given day.)

It is scarcely necessary to mention that as a mortgage transfers to the mortgagee an interest in the property pledged to him, he will not, as a rule, be bound by any subsequent act of the mortgagor unless it is done by him as agent for the mortgagee; and it is upon this principle that it has been held that the mortgagee is not estopped by a judgment against the mortgagor. (*Krishnaji v. Sitaram*, I. L. R., V Bom., 496. Cf. II Agra H. C. Rep., 117.) It must, however, be added that in both these cases there were strong grounds for suspecting collusion. In the case of *Poresh Nath v. Anathnath*, (I. L. R., IX Calc., 265) their Lordships of the Privy Council held the mortgagee bound by an estoppel arising out of the mortgagor's conduct. But it appears that the mortgage was created after the disclaimer which gave rise to the estoppel (a).

There being nothing in this Act corresponding to sec. 61 of the English Statute, where money is advanced on a joint account the survivors alone cannot give a valid receipt for the mortgage-money. (See sec. 45 of the Contract Act.)

Mortgage
when to be
by assur-
ance.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Equitable mortgages are recognised only to a very limited extent by the present Act. Such mortgages are opposed to the policy of the registration law and are at variance with the principle of making the transfer of immoveable property as far as possible a system of public transfer as on the continent. Equitable mortgages are allowed in the towns named above, because the practice has been long established in those towns, and could not be disturbed without creating much inconvenience. It is necessary to bear in mind that the

(a) It may be noticed in passing that although *Richards v. Johnston* (4 H. & N., 660) was cited before their Lordships, they declined to make any distinction as regards the operation of estoppels in favour of execution-purchasers, a distinction of extremely doubtful propriety. But see *Parbhu v. Mylne* (I. L. R., XIV Calc., 401.)

situation of the property is immaterial, as the law only requires that the mortgage should be made in some one of the places in the section mentioned. ACT IV OF
1882.
SECTION
59.

There must be an actual deposit of the title-deeds either with the creditor or his agent, and there can be no equitable mortgage if they are suffered to remain with the debtor, even if he should deliver a memorandum to that effect to the creditor. (*Exp. Coming*, 9 Ves., 115.)

It is, however, not necessary that all the title-deeds should be delivered, and a deposit of part of the deeds only may be sufficient to create an equitable mortgage. If the title deeds are deposited partly with one and partly with another creditor, priority in time will confer priority, in the absence, of course, of any circumstances to take the case out of the general rule.

It is hardly necessary to state that the deposit may be a security, as well for debts actually due as for future advances.

It ought to be observed that in an equitable mortgage by deposit the deeds themselves are not pledged to the creditor. They are held by the mortgagee merely as incident to the charge on the land. In cases governed by the English law, therefore, the equitable estate or charge will not be transferred by the mere delivery of the deeds by the creditor to a third person. (*In re Richardson*, 30 Ch. D., 396.)

It would seem that, as in the English law, equitable securities cannot be enforced against purchasers for value and without notice. (*Dayal v. Jiraj*, I. L. R., I Bom., 237.) The Act is silent as to the remedy to which an equitable mortgagee is entitled. In the absence of any express provision on the point, the English practice will most probably be followed.

The precise nature of a mortgage by deposit of title-deeds in the English law was discussed in the recent case of *In re Beethen* (18 Q. B. D., 380, 766, C. A.), and it was held that where a third person already has possession of title-deeds for another purpose, an oral communication from a part owner of the property to which the title-deeds relate purporting to make such third person a trustee of the deeds for a creditor cannot create a good equitable mortgage in favour of that creditor. It must not, however, be supposed that an equitable mortgage may not be created by a deposit of title-deeds with a trustee for the intended mortgagee, and in this country the Statute of Frauds not being in force, it seems that the creation of a mere parol trust in favour of the mortgagee may operate as a valid equitable mortgage. The law of equitable mortgages in England forms a branch of the equitable doctrine of specific performance of oral contracts relating to land based on part performance. Unless therefore there is an actual deposit of title-deeds, there is nothing in the nature of part performance to take the case out of the Statute of Frauds.

I have already pointed out that where there is a memorandum in writing accompanying a deposit of title-deeds, the mortgage may be proved notwithstanding the inadmissibility in evidence of the writing (see pp. 79-88, *ante*.) The reason for this is that the memorandum does not operate as a reduction into writing of the agreement between the parties with regard to the security. The question turns on the general principles of the law of evidence. Was the document intended to be the embodiment in writing of the transaction? If so, evidence of an oral agreement would be inadmissible; but if there was a complete oral contract before the writing was given, and the document does not express

ACT IV OF 1882. SECTION 60. and was never intended to express the whole agreement between the parties, evidence can be given of such agreement (*Newlove v. Shrewsbury*, 21 Q. B. D., 41, a case under the Bills of Sale Acts. Cf. *North &c. Co. v. Manchester &c. Co.*, 35 Ch. D., 191).

It seems to have been decided in Ireland that an equitable mortgage by deposit unaccompanied by any memorandum in writing takes priority over a purchaser for value claiming under a subsequent registered deed without notice of such deposit (*In re Burke*, C. A. Ir., 9 L. R. Ir., 24.)

See pp. 89, 90, *ante*.

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem.

60. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor, either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished : (a)

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all

(a) The section, it may be noticed, says nothing as to the right of the mortgagor to get back his title-deeds.

such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

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This section says nothing about the right of the mortgagee to any interest or notice of payment after default by the mortgagor. In England the mortgagee, except where foreclosure proceedings have been instituted or a demand made by him, is entitled to six months' notice or six months' interest. (*In re Alcock*, 23 Ch. D., 372.)

The last clause of the section, I may observe, is not very carefully drawn and does not deal with the various questions which might arise in such cases and which have been discussed in Lec. VI (pp. 254—260, *ante*.)

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Right to
redeem one
of two prop-
erties sep-
arately
mortgaged.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

This section excludes the application of the principle of consolidation under which the mortgagee might insist that all the securities held by him should be redeemed together.

It is not quite clear how cases of the class discussed in Lec. XII (pp. 386—387, *ante*), will be dealt with under the present act. The section, however, does not touch the principle on which debts are tacked against the heir or devisee of the mortgagor, but not so as to give the mortgagee preference over other creditors, where the assets are insufficient. (*Tulbot v. Frere*, 9 Ch. D., 568.)

It is sometimes said that if A creates a mortgage in favour of B and the mortgage being realized he has a balance in his hands, natural justice would seem to point out that he would be entitled to retain the surplus and apply it in payment of a general debt due to him. But there really is no equity in allowing one creditor, simply because he happens to have a mortgage, to retain the balance in favour of himself to the prejudice of the other creditors. You cannot make a property which has been pledged for the repayment of one debt liable to two debts. (*In re Gregson*, 36 Ch. D., 223, and cases cited therein.)

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

Right of
usufructu-
ary mort-
gagor to
recover
possession.

(a) Where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid ;

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63.
—

(b) Where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

The last clause of this section is not very happily worded; it, however, evidently points to cases in which there is to be no account of the rents and profits on the one side, nor of the interest on the other, the former given in lieu of the latter.

Accession
to mort-
gaged pro-
perty.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession
acquired in
virtue of
transferred
ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession, shall be credited to the mortgagor.

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

The section would at first sight seem to recognise the right of the mortgagor to all accessions, however made, to the mortgaged property, during the continuance of the mortgage and not simply to those acquired by the mortgagee by availing himself in any way of his rights as mortgagee. But the first clause may be read as applying to natural accessions only, while the first part of the second clause would seem only to make it obligatory on the mortgagor to pay the mortgagee the expense of acquiring the accession, without saying that he is entitled to it in all cases. This construction would render the section consistent with principle as well as authority. (See pp. 94—104, *ante*.)

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

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64, 65.

—
Renewal of
mortgaged
lease.

This section lays down a more stringent rule than the corresponding section in the Indian Trust's Act, or that which obtains in the English law, according to which the rule applies only when the mortgagee obtains a renewal behind the back of the mortgagor, or where there is a tenant right of renewal. (*Nesbitt v. Tredinnick*, 1 Ba. & Be., 29. But see *Clegg v. Edmondson*, 8 DeG. M. & G., 787, a partnership case.) See also illustration (d) to sec. 3 of the Specific Act.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee;

Implied
contracts
by mort-
gagor.

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists, and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts (a);

(a) Mortgages of permanent tenures are left unprovided for probably because the draftsman copied the section from the English Act. (See sub-sec. D., sec. 7 of the Conveyancing Act of 1881.) It seems that the land revenue will be regarded as a public charge within the meaning of cl. (c). (Cf. sec. 76, cl. c.) Where a leasehold property is mortgaged the mortgagee ought to give notice to the lessor of his mortgage, as he would otherwise expose himself to the risk of losing his security. (*Galbraith v. Cooper*, 8 H. L. C., 315.)

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66.
—

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage (a).

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

This section is modelled on the provisions of the Conveyancing Act, 1881 (see sec. 7, cls. c, d, f.); cl. (b) of the present section, however, is an innovation, although scarcely an improvement. It is evidently a crystallisation of two old cases in the Sudder Dewany Adalat, and will probably be found difficult to apply in practice. (See p. 277, *ante*.) The last clause only lays down the rule that the covenants run with the land.

I may here mention that, according to the English cases, there is no difference in principle between a covenant against incumbrances and a covenant to pay them off. The American rule, however, is different; the plaintiff being only entitled to nominal damages, unless he has paid something to the discharge of the incumbrances. (Mayne on Damages, pp. 204-205.)

Waste by
mortgagor
in posses-
sion.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient, or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section, unless the value of the mortgaged property exceeds by one-third, or if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

This section imposes upon the mortgagor the duty of abstaining from committing voluntary waste in cases in which the rights of the mortgagee may be prejudiced. If the Court be satisfied that the security is insufficient, it will interfere to prevent waste by injunction.

(a) As to the liability of a mortgagee of leasehold for rent, see *Macnaghten v. Bhecharree* (II Calc. L. Rep., 323), *Macnaghten v. Mewa* (III Calc. L. Rep., 285).

(Coote, 770.) It seems that the onus of proof that the security is insufficient will lie on the mortgagee seeking to restrain the mortgagor. The explanation embodies the ordinary rule acted upon by trustees not to lend more than two-thirds of the value on land or more than a half on house property. Properly speaking, however, a security is insufficient when it being worth so much more than the money advanced, the act complained of is likely to impair the value which was the basis of the contract. (*King v. Smith*, 2 Ha., 243.) It seems that a mortgagor who has conveyed the equity of redemption without taking any security as an indemnity against his bond cannot have an injunction against the purchaser to stay waste on the ground that the land may not be sufficient to satisfy the mortgage. (Kerr on Injunctions, 85, citing *Brumley v. Fanning*, 1 Johns.) As to the right of a mortgagor to fell timber the following English cases may be referred to:—*Farrant v. Lovel* (3 Atk., 723); *Humphreys v. Harrison* (1 Jac. & W., 581); *King v. Smith* (2 Hare, 239); *Hampton v. Hodges* (8 Ves., 105); *Hippesley v. Spencer* (5 Mad., 422.)

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It seems that the Act contains an absolute prohibition as regards waste by the mortgagee (cl. (e), sec. 76). The English practice which is somewhat less stringent is thus stated in Kerr on Injunctions (p. 83.) "A mortgagee in possession with a sufficient security may not commit waste, and he is bound to do necessary repairs. If, however, the security is insufficient, he is entitled, so long as he is acting *bonâ fide*, to make the most of the property for the purpose of discharging what is due to him. He may cut timber, and open mines or quarries, but he does so at his own risk and peril. If he incurs a loss, he cannot charge it against the mortgagor, and if he obtains a profit, the whole of that profit must go in discharge of the mortgage-debt. If the security is sufficient, and he has no authority from the mortgagor, he will under similar circumstances be charged with his receipts and disallowed his expenses. If the mortgage be of an open mine, the mortgagee is entitled to work it as a prudent owner would do, and he is not bound to advance money for speculative improvements."

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

Right to
foreclosure
or sale.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such

ACT IV OF 1882. SECTION 67. — to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Clauses (b) and (c) are based on the practice of the English Court of Chancery. Clause (b) assumes that the rights of the parties are best worked out by a decree for sale, and not by a decree for foreclosure, while cl. (c) is founded upon the inconvenience to the public generally if undertakings of the character mentioned in it were liable to be foreclosed or sold. In such cases the proper course for the mortgagee would be to apply for the appointment of a Receiver. (*In re Herne &c. Co.*, 10 Ch. D., 42.) Clause (d) in terms applies only to suits relating to a part only of the mortgaged property; but, as we have already seen, a mortgagee interested in part only of the mortgage-money, cannot, as a rule, sue even in respect of the whole without joining his fellow mortgagees. (See *Parsotam v. Mulu*, I. L. R., IX All., 68; and cases cited therein. Cf. *Palmer v. Earl of Carlisle*, 1 S. & S., 423.)

The right of an usufructuary mortgagee to institute a suit for sale was discussed in a very recent case in the Madras High Court (*Venkata Sami v. Subramanya*, I. L. R., XI Mad., 88.) In giving judgment the Court observed: "Whether the mortgagee is at liberty to claim foreclosure as of right will depend upon the terms of the particular contract, but the contract as defined by the Act does not imply an intention that the mortgagee may at his option insist upon either remedy as in the case of an English mortgage. Section 67, cl. (a), provides that the usufructuary mortgagee is not entitled as such, in the absence of an express contract to the contrary, to institute a suit for foreclosure or sale. It implies that he can sue only for the one or for the other, and not for the one or the other in the alternative. That this is the true construction is clear from secs. 86—89, the language of which and, in particular, the words in sec. 86, 'shall transfer the property to the defendant, and shall, if necessary, put the defendant into possession of the property,' include usufructuary mortgages among transactions upon which the mortgagee may institute a suit for foreclosure or a suit for sale.

"It is important to bear in mind the distinction that exists between the power of the Court to decree a sale in a suit for foreclosure, and the right of the usufructuary mortgagee as founded on the contract. The second paragraph of sec. 88 deals with such power and is taken from 44

and 45 Vict., c. 41, s. 25. It was a power constantly exercised by Courts of Equity in England, and it may be that it is inserted in this act with reference to a notion which was commonly held in this country, that a mortgage was intended to be only a security and to be always redeemable. In exercising this power the Court is authorized to impose such terms as it thinks fit to prevent injustice or unfairness to the mortgagee."

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—

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

Right to
sue for
mortgage-
money.

(a) where the mortgagor binds himself to repay the same:

(b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money (a).

Clause (a) is a departure from the English rule according to which every mortgage implies a loan and therefore a debt. (*King v. King*, 3 P. W., m. s., 358.)

The effect of the last part of cl. c, is not quite clear. No doubt where the mortgagee is evicted by the mortgagor or a person claiming under a superior title, the money may be recovered back; but would the same rule hold good if the mortgagee was wrongfully evicted by a third person without any title? It is true the clause speaks of disturbance generally, and not simply lawful disturbance. But the Legislature could scarcely have intended to make the mortgagor liable for the capricious and wrongful acts of third persons. (*Jhabhu v. Girdhari*, I. L. R., VI All., 298.) In speaking of covenants to indemnify generally against all persons, Lord Ellenborough said: "The rule has been correctly stated that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest,

(a) In addition to the authorities cited in Lec. II, p. 41, see *Vithoba v. Chotalal* (VIII Bom. H. C. Rep., a. c. j., 116.)

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and therefore the law has properly restrained it, within its reasonable import, that is, to lawful title. It is, however, different, where the individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise." (*Nash v. Palmer*, 1 B. & C., 29.)

It appears that if the mortgagee is unable to obtain possession by reason of the mortgaged estate not being transferable under the law, he will be entitled to recover his money under cl. (b) of this section. The mortgagee is not bound in such cases to require the mortgagor to give him another security for the debt under cl. (c). (*Ganesh v. Sujhari*, I. L. R., X All., 47.)

In the case of *Ganga v. Luckman* (I. L. R., VIII All., 194), it appears that by a deed of usufructuary mortgage dated in 1875 a sum of Rs. 30,000 with interest at Re. 1 per cent. per mensem was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and among these a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed, to the date of the suit at Re. 1-6 per cent. per mensem. It was held by the Court that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, *i.e.*, Re. 1 per cent. per mensem.

Power of
sale when
valid.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases and in no others (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

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But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due (a).

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees and Mortgagees, Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgage pro-

(a) As to when the interest may be said to be in arrear, see *Cockburn v. Edwards* (18 Ch. D., 449).

ACT IV OF 1882, SECTION 69. perty may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist.

This section recognises the validity of a power of sale only in a very attenuated form. It has been sometimes said that a mortgagee is a trustee of the power of sale, but it is now settled that this is not so. The power is given to him for his own benefit, in order that he may realize his debt and, "if he exercises it *bonâ fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud." (*Warner v. Jacob*, 20 Ch. D., 220.) But neither the mortgagee nor his agent acting for him in the matter of the sale can buy the property. (*Martinson v. Clowes*, 21 Ch. D., 857; and the cases cited therein. Cf. *Pitamber v. Vannali*, I. L. R., II Bom., 1.) But the mortgagee may buy with the consent of the mortgagor. (*Purmananddas v. Jamna Bai*, I. L. R., X Bom., 49.)

The words in professed exercise of such power are equivalent to purporting to be made in pursuance of the power. A sale, therefore, to a *bonâ fide* purchaser without notice would be valid even if the security should prove to have been satisfied. (*Dicker v. Augusteen*, 3 Ch. D., 600. Cf. *Madras D. and B. Society v. Passanha*, I. L. R., XI Mad., 201.)

It must not, however, be inferred that a purchaser taking with actual notice would be protected. The second paragraph of the section only embodies the usual clause in a mortgage with a power of sale. But such a clause has never been held to protect a purchaser with notice of the irregularity of the sale. This proposition, as Mr. Justice Kay observes, 'commends itself to one's common sense and reason most emphatically because if there be a restriction upon a mortgagee's power of sale, and a purchaser buys from the mortgagee, knowing at the time that the mortgagee, by reason of not having complied with the conditions in the power, has no right to exercise the power, it would be a gross injustice to allow such a purchaser to maintain the purchase as against the mortgagor.' (*Selwyn v. Garfit*, 38 Ch. D., 273. Cf. *Parkinson v. Hanbury*, 1 Dr. & Sm., 143, *Kershaw v. Kalow*, 19 Jur., 974.) If, however, the irregularity is one, which might have been waived, the purchaser would probably be protected if he had reasonable grounds for supposing that there had been such a waiver. (As to the liability of the first mortgagee for the balance of the purchase-money paid over to the mortgagor to a second mortgagee, where the first mortgagee had notice of the second mortgage, see *West &c. Bank v. Reliance &c. Society*, 27 Ch. D., 187; 29 Ch. D., 954 (C. A.))

The section speaks only of notice to the mortgagor or one of several mortgagors, but not to their assigns. Where, however, the mortgagee has notice of an assignment of the equity of redemption either by way of mortgage or otherwise, it would be prudent for him to give notice to the assignee of his intention to exercise the power of sale. (*Hoole v. Smith*, 17 Ch. D., 434.)

As regards the right of the mortgagor to restrain a sale, the general rule is that a sale by a mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him, but this does not apply where the Court can see on the terms of the deed that this amount

cannot be due on the security. (*Hickson v. Darlow*, 23 Ch. D., 690. ACT IV OF 1882. Distinguishing *Hill v. Kirkwood*, 28 W. R., 358.) But although a sale may be restrained after an offer to redeem or to deposit the amount of the mortgage-debt, the mere commencement of an action for redemption will not stop the sale. (*Jaggivan v. Shridhar*, I. L. R., II Bom., 252. Cf. *Adams v. Scott*, 7 W. R., 213.) SECTIONS 70—72.

A sale by the mortgagee in order to pass an indefeasible estate must be in pursuance of the power to sell. Where, therefore, the deed was in the form followed when a mortgagor is the vendor and the mortgagees join in the conveyance, but the words of conveyance were by the mortgagees alone and without any confirmation by the mortgagor, it was held that the purchaser did not, by the deed, acquire an indefeasible estate. (*Doucett v. Wise*, III Suth. W. R., 157.)

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession. Accession to mortgaged property.

Illustrations.

(a.) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b.) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

This section is silent as to the right of a mortgagee to enforce his security as against a *bonâ fide* purchaser, without notice, of the accretion. It would, however, seem that the mortgagee cannot reduce the security by alienating it. (*Doe d. Gibbons v. Pott*, 2 Dougl., 709.)

It has been held in England that a mortgagee of a leasehold messuage will comprise the good-will of the business carried on there. (*Chissum v. Dewes*, 5 Russ., 29; Cf. *Pile v. Pile*, 3 Ch. D., 36.)

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease. Renewal of mortgaged lease.

It seems that the renewal need not be in accordance with a covenant to renew. It is scarcely necessary to point out that if the mortgagor renders the renewal impossible by purchasing the reversion, the estate so acquired will be subject to the mortgage. (Coote, 268.)

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary— Rights of mortgagee in possession.

(a) for the due management of the property and the collection of the rents and profits thereof;

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(b) for its preservation from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed, or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

The Act is silent with regard to the right of the mortgagee to take possession of the mortgaged premises. In the case of English mortgages the law is thus summarised in Bullen and Leake's Precedents of Pleadings:—"Where the mortgage-deed contains no proviso or stipulation amounting in law to a redemise, and the mortgagor remains in possession after the execution of the deed, the mortgagee may bring an action against the mortgagor for possession of the premises, unless a tenancy, other than one of sufferance, has been created between them. (*Doe d. Roylance v. Lightfoot*, 8 M. & W., 553; *Doe d. Parsley v. Day*, 2 Q. B., 147.) Where no tenancy other than a tenancy by sufferance has been created, it is unnecessary for the mortgagee before bringing such action to give any notice to quit or to make any demand of possession. (*Doe d. Roby v. Maisey*, 8 B. & C., 767; *Doe d. Fisher v. Giles*, 5 Bing., 421.)

"If the deed contains any proviso or stipulation that the mortgagor may remain in possession until a certain day or until default in payment of a certain sum at a particular time, and it is executed by the mortgagee, it in general amounts in law to a redemise; and no action for the recovery of the premises can be maintained until after such

day or default. (*Wilkinson v. Hall*, 3 Bing. N. C., 508; *Deo d. Lyster* ACT IV OF 1882. *v. Goldwin*, 2 Q. B., 143.) In some cases, however, the proviso or stipulation may amount only to a covenant. See *Shep. Touch.* 272; SECTION 72. *Doe d. Parsley v. Day*, *supra*; *Cole on Ejectment*, p. 464 *et seq.*

"Where the mortgage-deed stipulates for payment of a certain sum on a particular day, and the mortgagor makes default in payment and remains in possession of the premises after such default, an action may, in the absence of any new tenancy, be brought against him by the mortgagee for recovery of the premises without any previous notice to quit, or demand of possession. (*Doe d. Fisher v. Giles*, *supra*; *Doe d. Roby v. Maisey*, *supra*.) See further, *Cole on Ejectment*, p. 462 *et seq.*

"Where the mortgagor has no title to possession, the mortgagee may, without giving notice to quit, recover possession of the mortgaged premises against a tenant who claims under a lease from the mortgagor granted after the mortgage without the privity or consent of the mortgagee, unless such tenant has become tenant to the mortgagee, or unless the lease is one made under 44 & 45 Vict., c. 41, sec. 18. (*Keech v. Hall*, 1 Doug., 22; 1 Smith, L. D., 18th Ed., p. 574; *Lows v. Telford*, 1 App. Cas., 414, 425.) A mere notice by the mortgagee to the tenant to pay rent to him, not assented to by the tenant, will not create a new tenancy; but a notice assented to by payment of rent, or otherwise, is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee, and the tenant in possession. (*Brown v. Storey*, 1 M. & G. 117; *Rogers v. Humphreys*, 4 A. & E. 299, 313; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307) (a).

"In the case of a tenancy created before the mortgage, the tenant will be entitled to possession until the tenancy has been determined by notice to quit, or otherwise.

"Where a person was in possession before the mortgage adversely to the mortgagor, the plaintiff must rely upon the title conferred upon him by the mortgage-deed, and must proceed against him as in ordinary cases between strangers. See further, *Cole on Ejectment*, pp. 473, 475 *et seq.*" *Bullen and Leake's Precedents*, Part I, pp. 503—505.

It seems that an advance payment of rent to the mortgagor, though made in ignorance of the mortgage, will not be good against the mortgagee. (*DeNicholls v. Saunders*, 5 C. P., 589.)

A mortgagee in possession labours under various disadvantages; and he has been rightly described as a bailiff without any salary. But the tendency in modern times has been towards leniency. In this country, although he is allowed the salary of agents for the purpose of collecting the rents, no allowance is made for his personal trouble, and although allowance is made in respect of actual outgoings, he must be prepared, if challenged, to justify every item of his expenditure. The Act does not deal with the power of the mortgagee to appoint a Receiver of the income of the mortgaged property (cf. 44 & 45 Vict., c. 41, sec. 19, sub-sec. 3). But of course under sec. 503 of the Civil Procedure Code a Receiver may be appointed where an action is pending. (As to the practice in England, see *Kerr on Receivers*, pp. 29—39, see also Act 28 of 1866.) It ought to be noted that under the Judicature Act a legal mortgagee may apply for the appointment of a Receiver. (*Tillet v. Nixon*, 25 Ch. D., 238.)

(a) See also *Underhay v. Read* (20 Q. B. D., 209).

ACT IV OF 1882. The word "sale" in cl. (b) must perhaps be understood *ejusdem generis* with destruction and forfeiture.

SECTIONS 73-75. The mortgagee will be entitled to expenses incurred in doing what is essential to protect the mortgagor's title (*Sandon v. Hooper*, 6 Beav., 246), as well as in making his own title good against the mortgagor, but not, it seems, in defending his title to the mortgage against a third person. (*Parker v. Watkins*, 2 Johns, 133.)

The mode in which the insurance money is to be applied is dealt with in sec. 76.

It is necessary to observe that if the security is in the form of a conditional sale or an English mortgage, and the mortgagor elects to be foreclosed, he may not be personally sued by the mortgagee for his outlay. (*Ex parte Fewings*, 25 Ch. D., 338.) A properly drawn mortgage-deed should, therefore, contain a covenant on the part of the mortgagor to pay all such moneys. It will be noticed that a distinction is made by the Act between premiums paid for insurance and other kinds of outlay by the mortgagee.

Charge on proceeds of revenue-sale.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

This section, although not very carefully worded, is evidently intended to deal with cases in which the sale has the effect of setting the property free from incumbrances. (*Premchand v. Purnima*, I. L. R., XV Calc., 546.)

I may here add that in Madras a sale for arrears of rent does not pass the property to the purchaser free from incumbrances. (*Pada-kannaya v. Narasimma*, I. L. R., X Mad., 266.)

Right of subsequent mortgagee to pay off prior mortgagee.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents), the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Rights of mesne mortgagee against prior and subsequent mortgagees.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

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(a) he must manage the property as a person of ordinary prudence would manage it if it were his own ;

(b) he must use his best endeavours to collect the rents and profits thereof ;

Liabilities
of mortga-
gee in pos-
session.

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold ;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof, after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;

(e) he must not commit any act which is destructive or permanently injurious to the property ;

(f) where he has insured the whole or any part of the property against loss or damage, by fire, he must in case of such loss or damage apply any money which he actually receives under the policy, or so much thereof as may be necessary in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due

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 — on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

Loss occasioned by his default. If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

(See pp. 287—312, *ante*.)

Questions sometimes arise as to what acts on the part of the mortgagee amount to taking possession. In England it has been held that the mere fact of insuring the property by the mortgagee or his asking for rent, if he does not obtain it, is not sufficient to render him liable to account as mortgagee in possession. A mortgagee, however, who gives notice to the tenants not to pay their rents to the mortgagor, must answer for any loss arising from his conduct if he abstains from taking possession. A mortgagee is not bound to take possession of the whole of the mortgaged property. He may, if he likes, take possession of only a part. In India, attornment clauses are not very common. As a rule, their effect is to put the mortgagee in the position of a mortgagee in possession, as between himself and a subsequent mortgagee, but not as regards the mortgagor. (*Harrison Exp.*, 18 Ch. D., 127.)

The Court requires the mortgagee to be diligent in realising his security, and although he is not bound to make the most of another man's property, he will be charged for wilful default. He is not, however, bound to account according to the actual value of the land; and if he enters into the receipt of rents he is only charged at the rate of rents reserved. If the security consists of a lease at a rent to be retained by the mortgagee in discharge of his debt, the account will be taken only on the footing of such rent. The general rule on the subject is thus stated in Coote on Mortgage, p. 1202:—

“The mortgagee is liable if he refuse or remove a sufficient tenant; but the evidence must be distinct, and the mortgagee will not be subject to minute inquiries whether he could have got more rent, and the like, and he may be excused for not accepting a higher offer, if the tenant is in arrear and by removing him the arrear might have been lost; and it is the duty of the mortgagor to give notice to the mortgagee, that the estate may be made more productive; and if the mortgagor omit to do so, or is party to any act to prevent the letting, he cannot charge the mortgagee with mismanagement.

“The mortgagee accounts for rent according to the rate which has been reserved, and the rate at which the premises were let when he took possession will be taken to be the rate at which it was let during the whole time of his possession, unless the contrary is shown; and where a lease by the mortgagor to the mortgagee is set aside, the mortgagee will not be charged with more than the rent reserved in the lease, unless it is proved that a higher rent could have been obtained; and the rate reserved will be continued until the first pay-

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ment after action brought, from which time a fair rent will be fixed by the Court; and generally the mortgagee cannot usually be charged with more than he has received, or according to the actual value of the land, unless it can be proved that, but for his gross default, mismanagement, or fraud, he might have received more."

In this country the practice seems to be in some Courts to accept the *jamahundi* papers as *primâ facie* evidence of the profits of the estate, it being open to the mortgagee in possession to show that the amounts entered in them could not with due diligence be collected. (*Deo Narain Sing v. Nuek Pershad*, II All. H. C. Rep., 217.) The burden of proof is thus thrown on the mortgagee.

But if the mortgagee enters upon possession in the honest belief that he has an absolute title to the property, he will be only bound to account for what he has actually received. (*Parkinson v. Hanbury*, L. R., 2. H. L., 1.) As a rule, it is not the practice in equity to direct an account with wilful default except against bailiffs or in cases of fraud or breach of trust. The case of the mortgagee would seem to be an exception to this rule, probably, because he is regarded as in the nature of a bailiff, though an unpaid bailiff to the mortgagor. (See the observations of Lord Westbury in the case cited above.) In this country, it has been held that if the mortgagee continues in possession not in the character of mortgagee, but under a different title, he will not be liable to account as mortgagee in possession. (N.-W. P., 1852, p. 7, where the Court considered the mortgage to have been in abeyance during the term of a farming lease held by the mortgagee under Government.)

But if, on the other hand, the mortgagee fraudulently denies his character as such, he cannot afterwards turn round and claim the privileges of a mortgagee. In the *Incorporated Society v. Richards*, (1 Drury and Warrens, 334), the Lord Chancellor said:—

"This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such, and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor."

A mortgagee in possession does not render annual accounts, but he may be called on for a final adjustment when the mortgage-debt is satisfied, or the mortgagor wishes to redeem. Clause (h) makes a distinction between possession and occupation. A man may be in possession of an estate without being in occupation of any part of it. Any one is in possession of an estate who receives rent from the tenants who occupy it. But, except in the case of joint tenants or tenants in common, it is impossible for a man to be in occupation if somebody else is in occupation.

Although the clause speaks of personal occupation, it is evidently not intended to exclude occupation by a servant. Where, however, the mortgagee is not in occupation himself, it must be shown that the person in actual occupation was let in under such circumstances as would place him in the legal relation of a servant to the mortgagee, and it would not be sufficient to show that he was let in merely as a licensee. It does not, however, follow that the mortgagee might not be liable as for wilful default. (*Shepard v. Jones*, 21 Ch. D., 469.)

ACT IV OF 1882. In India, as a rule, the account is taken with annual rests, and in the case of *Jaijit v. Govind* (I. L. R., VI All., 303), the rest was made at the time at which the Government-revenue became payable. In England a rest is made, when the account is taken with rests, as soon as the mortgagee has received a sum exceeding the amount of interest due to him, and the annual rests are thenceforth computed from that time. (As to the mode of taking accounts, see *Jaijit v. Govind*, cited above) (a).

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If the mortgagee fails to perform any of the duties imposed upon him, or makes an unjust defence, not only will he be debited with the loss sustained by the mortgagor, but he might also forfeit his right to costs. (*Kulyan v. Sheo Nundun*, XVIII Suth. W. R., 65; *Tasaduk v. Beni*, XIII Calc. L. Rep., 128; *Mukhun v. Sree Kishen*, XII Moore's Ind. App., 157. Cf. *Ashworth v. Lord*, 36 Ch. D., 545.)

The last clause contains a legislative reversal of the decision of the Allahabad High Court in the case of *Raghu v. Ashruff* (I. L. R., II All., 252).

Receipts
in lieu of
interest.

77. Nothing in section seventy-six, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority.

Postpone-
ment of
prior mort-
gagee.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Fraud and misrepresentation have been defined in the Contract Act (see secs. 17 and 18). The words "gross neglect" are not susceptible of any precise definition. In several English cases we come across such expressions as "negligence amounting to fraud" or "gross and wilful negligence," which is evidence of fraud. But these expressions are wanting in precision. Gross neglect or carelessness, therefore, may be sufficient to postpone a mortgagee, although he may be perfectly innocent of any intention to mislead another to his prejudice. In England, owing to the historical distinction between legal and equitable titles and the sanctity which hedges in the former, a legal title cannot be displaced merely on the ground of carelessness or negligence, however gross (b). In order to have that effect there must be fraud.

(a) In Ireland half-yearly rests are made without special direction (*Graham v. Walker*, 11 Ir. R. Eq., 415). As to the practice in England, see L. R., 10 Eq., 497.

(b) The superior efficacy of a legal title is well illustrated by the rule that a legal estate created by a trustee would defeat the rights of the *cestui que trust*, whereas a merely equitable estate created by the trustee would have no such effect. (*Newton v. Newton*, 6 L. R., Eq., 135; 4 L. R., Ch. App., 143.)

(*Northern Counties E. F. I. Co. v. Whipp*, 26 Ch. D., 482; *In re Vernon Ewens and Company*, 32 Ch. D., 165.) But this rule does not hold good as between two competing equitable titles, and circumstances which would not justify the Court in depriving a legal mortgagee of the benefit of the legal estate may yet, as between two equities, give priority to the one over the other. (*National P. Bank v. Jackson*, 33 Ch. D., 1.)

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The language of the present section shows that mere neglect, if it is gross, may deprive a mortgagee of his priority. The negligence of the mortgagee may not only have the effect of postponing his security to that of a person not guilty of such negligence, but also to those of others advancing money upon the faith that such person was the only prior mortgagee. In *Clarke v. Palmer* (21 Ch. D., 124), it appears that *P.* mortgaged certain estates to *M.*, and was allowed to retain possession of the title-deeds. He subsequently mortgaged one of the estates to *A. B.*, who obtained possession of the deeds, and all the estates to *C.*, who advanced his monies after ascertaining the position of the deeds, and upon the faith that *A. B.* was the only prior mortgagee. It was held, that *M.*, by not obtaining possession of the deeds, enabled *P.* to deal with his estates as an unencumbered owner; that *A. B.*, having been diligent in obtaining the deeds acquired priority, and that *C.* also having been diligent in ascertaining that *A. B.* had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over *M.*

The English cases on the effect of negligence in postponing the prior incumbrancer are thus summarised in Dart's Vendors and Purchasers, pp. 952, 953 :—"First. Where the prior interest is legal, and the other equitable. In this case the prior legal estate will not be postponed to the subsequent equitable estate 'on the ground of any mere carelessness, or want of prudence on the part of the legal owner.' But the Court will postpone the prior legal estate to a subsequent equitable estate :

"(I) Where the owner of the legal estate has either wittingly or unwittingly 'assisted in or connived at the fraud which has led to the creation of the subsequent equitable estate without notice of the prior legal estate'; and evidence of such innocent assistance or connivance may be afforded by the absence of ordinary care in inquiring for or keeping title-deeds, and such conduct, if not satisfactorily explained, will be sufficient to postpone the legal estate.

"(II) Where the owner of the legal estate has constituted the mortgagor his agent to raise money, and has for the purpose either left the deeds in his custody, or returned them to him, and the mortgagor has, by means of the possession of the deeds, created the equitable estate without notice of the prior legal estate, even although the principal had no intention that his agent should commit a fraud, or knowledge that he was doing so.

"Secondly. Where the prior interests are both equitable, although it would seem that a less degree of negligence on the part of the prior equitable incumbrancer is necessary in order to postpone him than will suffice to postpone the owner of a prior legal estate, yet here, too, there must be something done, or omitted to be done, by the prior incumbrancer, which arms the owner of the estate with the power of going into the world under false colours. Thus, where *B.*, the solicitor of *A.*, a second mortgagee, put up the property for sale by

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 auction, and professing to have bought it, induced *A.* to execute a conveyance of the property by which *A.* purported to convey it to *B.* under his power of sale; and *B.* afterwards made an equitable mortgage of the estate to *C.*, representing it to be his own and unincumbered; it was held that *A.* had by executing the conveyance enabled *B.* to commit the fraud on *C.*, and must be postponed to him; and, on the same principle, a vendor with an equitable lien for unpaid purchase-money will be postponed to a mortgagee from the purchaser who has been allowed to carry away the title-deeds and conveyance. But the mere fact that a subsequent incumbrancer has got the title-deeds does not entitle him to priority, unless there has been some active omission or negligence of the kind above described; and where a person has in good faith relied on a positive statement by the mortgagor that the latter is depositing all the necessary deeds, without any examination into the truth of it, he will not be postponed to a later equitable mortgagee, who has got important title-deeds which the mortgagor had in fact kept back." (See also Lewin on Trusts, pp. 714—717.)

Mortgage to secure uncertain amount when maximum is expressed.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co. and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B. & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

The law here laid down is different from the rule which obtains in England, where the right of the first mortgagee to priority depends upon whether he had or had not notice of the second mortgage when the subsequent advances were made. It is not clear from the section whether the rule applies only to cases in which the mortgagee is bound to make the advance. Unless the application of the section is limited in this manner, it would unfairly cripple the powers of the mortgagor in dealing with his property. As observed by Lord Campbell, although the mortgagor has parted with the legal interest, he remains the equitable owner of all his interest not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee, then, injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee

should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan. Of course, these observations only apply where the mortgagee has the option to make further advances. (*Hopkinson v. Rolt*, 9 H. L., 522; *Bradford Banking Co. v. Briggs*, 12 App. Cas., 29; *Union B. S. v. National B. S.*, 12 App. Cas., 53; a Scotch Appeal, the report of which contains the judgments of the Court of Session, in which the Scotch law of security is reviewed.) It would seem that where no maximum amount is fixed, and the security is given on account of the general balance of a floating account, the provisions of the section would not be applicable.

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Mortgage debentures of joint-stock companies constitute in our day an important class of securities. But although they may be declared to be a first charge on the property of the company, they are only floating securities, and would therefore attach only to such assets as may be forthcoming when the charge is to be made available. Debenture-holders, therefore, would not be entitled to priority over subsequent mortgages properly created by the company. The reason for it is that the issue of debentures by a company is not intended to prevent and cannot prevent the company from carrying on its business in the usual way. If, therefore, a mortgage is afterwards made for the purpose of the business and in the ordinary course, it will not be subject to the claim of the debenture-holders. "It would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on of the business of the company. The fact is, the only way of making the thing workable is to treat it as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge, at the moment the business is put an end to, either by the appointment of a Receiver in an action instituted by the debenture-holders against the company, or at the commencement of the winding-up where the company is wound up." *Per Jessel, M. R.*, in *Ex-parte Bradshaw*, (15 Ch. D., 472. Cf. *Wheatley v. Silkstone, &c., Co.*, 29 Ch. D., 715, and cases cited therein. Distinguish *In re Horne and Hellard*, 29 Ch. D., 736.)

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Tacking
abolished.

The necessity for this section is not quite obvious, as the doctrine known as tacking was never recognised in this country, and has been distinctly repudiated by our Courts upon the ground that it rests altogether upon an artificial foundation.

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1882.
SECTION
81.

Marshall-
ing secu-
rities.

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

The rule laid down in this section is narrower than the English rule, according to which it would seem to be perfectly immaterial, whether the subsequent mortgagee has or has not notice of the earlier mortgage. (*Gibson v. Seagrim*, 20 Beav., 614; *Tidd v. Lister*, 10 Hare, 157, overruling *Lanoy v. Duke of Athol*, 2 Atk., 446.) The section in terms applies only to mortgages, but the principle which underlies it would seem to be equally applicable to purchasers for valuable consideration without notice of the mortgage and *a fortiori* if there is declaration or covenant that the estate is free from incumbrances. If a mortgagor sells a portion of his equity of redemption for valuable consideration, the entire residue, if undisposed of by him, ought to be applicable in the first instance to the discharge of the mortgage, and in case of a *bonâ fide* purchaser; and it would be contrary to every principle of justice that a purchaser from the mortgagor should be in a better position than the mortgagor himself with respect to any of his rights. (*Per Plunket, C., Hartley v. O'Flaherty*, 1 Ll. & G. temp. Plunket, 219.) (See notes to sec. 56.)

In England marshalling takes place where one of two estates in mortgage is subject to a portion, or even is the subject-matter of a voluntary settlement. (*Rancliffe v. Parkyns*, 6 Dow., 216; *Hales v. Cox*, 32 Beav., 118.) Indeed, the principle has been extended in favour of a mortgagee of one of two estates charged with legacies and afterwards mortgaged to two different persons so as to allow the mortgagee of one estate to call upon the legatees to take so much out of the other estate as will leave a sufficiency to discharge his mortgage (*Ex-parte Hartley*, 2 M. & A., 436.) The principle of marshalling, however, as I have already said, cannot be enforced by one subsequent incumbrancer to the prejudice of another. In such cases the prior mortgage-debt will be ratably distributed. (*Barnes v. Raster*, 1 Yo. & Coll. C. C., 408-9.) For a form of decree and rule of apportionment applicable in such cases, see *Gunga v. Hurish* (VI Calc. L. Rep., 336.)

A surety is entitled to the benefit of marshalling. But he has no equity to prevent marshalling which will override the surety's right on payment of the debt to an assignment of the security. (*Heyman v. Dubois*, 13 Eq., 159.)

It ought to be noticed that if the property which is the subject of the second mortgage is exhausted by the first mortgagee, the former will be entitled to stand in the place of the latter as regards any other property comprised in the first mortgage. This principle can, of

course, hold good only where marshalling may be enforced, as, for instance, where the third mortgage is taken expressly subject to, and after payment of, the first and second mortgage. (*In re Mower's Trusts*, 8 L. R. Eq., 110.)

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SECTION
82.

The principle of marshalling is thus applicable not only before the debt has been paid, but involves the right of the disappointed creditor to stand in the place of the mortgagee having the double fund as against the other fund to the extent to which it has been satisfied out of the subsequent creditor's security.

The whole doctrine rests on the ground of the insufficiency of the common fund to satisfy the whole of the claims upon it, and has therefore, no application where the person with the double fund offers to redeem the creditor with the single fund. (Fisher, p. 669.)

The next section deals with contribution which is only another form of marshalling.

"Contribution, if it differs from marshalling, does so *in specie* rather than generically, in form rather than in nature. Marshalling and contribution are each of them between several persons of their rights respectively *inter se*, in respect of a charge or claim which affecting all of them, or properties belonging to all of them respectively, has been or may be enforced in a manner not unjust as far as the person is concerned by whom it was or may be enforced, but not just as between the persons or properties liable—a branch of jurisprudence known to the Civil law, and which could not but belong in some form more or less extensive, to an enlightened system of laws; in ours it is well established and familiar." *Per Vice-Chancellor Knight Bruce*, in *Tombs v. Rock* (2 Coll. 500.)

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Contribution to mortgage-debt.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt, after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section eighty-one to the claim of the second mortgagee.

This section is substantially a reproduction of the English law which is thus stated in a well-known Treatise on Mortgage:—

"If several estates, whether of one or of several owners, be mortgaged for or subject equally (and not one as surety or collateral

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SECTION 82.

security for the other), to one debt, or if the owner of several estates, having mortgaged one of them, charges his real estate with or devises it in trust for payment of his debts, and the estates descend or are devised to different persons (for the rule will not hold where they come to the same person), and though one of them pass by a specific and the other by a residuary devise, the several estates shall contribute rateably to the debt; being valued for that purpose, after deducting from each estate any other incumbrance by which it is affected; and a vendor's lien being reckoned like any other incumbrance. The right of contribution between estates so charged is not affected by Locke King's Act, which also does not affect the liability of real and personal estate to contribute rateably, when both are included in the same security. So if one of the estates have been mortgaged for one debt, and both of them for another, though the first shall bear exclusively its own debt, both must contribute rateably to that which is later; the amount of the first debt being deducted from the value of the estate which has paid it; but if there are successive loans, and successive securities, and nothing to show that one estate was to be charged before another, all will be charged rateably, provided there be an actual specific charge upon each estate, and not merely a general charge or liability upon one of them; it being necessary in order to raise a case of rateable apportionment that each property shall be equally liable. The right of contribution extends to sureties who are liable for the same debt, and whose liabilities are contemporaneous." (Fisher on Mortgage, pp. 659—60.)

The last clause of the section is also taken from the English law by which the right of contribution is controlled by the right of marshalling. The former right cannot therefore be exercised against an estate which is liable to the claims of other mortgagees. (*Bartholomew v. May*, 1 Atk., 487.)

It is necessary to state that if a chose an action is pledged together with other property, the debtor himself cannot claim a right to contribution. (Fisher on Mortgage, 661.)

It must be remembered that the right of contribution only arises where there are two or more properties available for the debt in equal degree. In order that a right to contribution may exist, the two properties must "be equally liable." (*Per Lord Eldon in Marquis of Bute v. Cunningham*, 2 Russ., 275;) or as Lord St. Leonards says, there must be a common fund. (*Averall v. Wade*, Ll. & G., 252, cited in *In re Dunlop*, 21 Ch. D., 583.) But it is, of course, quite competent to the mortgagor where two or more properties are comprised in the same security to direct the order in which the securities are to be applied *inter se* so as to make one, the first, and another, the second, and so forth, available for the purposes of the charge. Again, no right to contribution will arise except where there are special charges. A mere general lien will not, therefore, be sufficient for the purpose. (On the conflicting rights of assignees of two or more estates subject to a common charge to contribution, see *Lewin on Trusts*, pp. 717-720.)

Questions of contribution may also arise between persons having limited interests and those entitled in remainder. A person having a limited estate is not under any obligation to pay off the principal, but only to keep down the interest. He shall therefore contribute only in proportion to the benefit he derives from the discharge of the mortgage-debt. If the estate is, therefore, sold to pay the incumbrance

the tenant for life will be entitled to take the interest of the surplus, while the capital will belong to the remainderman. (Spence's Equity, p. 841.)

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1882.
SECTIONS
83, 84.

It must be remembered that the rule, that the mortgagee who purchases a portion of the equity of redemption cannot throw the whole of the mortgage-debt on the residue, does not apply to cases in which the mortgagee purchases for value and thereby diminishes his own security before the residue is transferred to third persons. They can only take subject to the mortgage and are not entitled to claim contribution. (*Gaya v. Salih*, I. L. R., III All., 682.)

Deposit in Court.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Power to
deposit
in Court
money due
on mort-
gage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints), stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to
money
deposited
by mort-
gagor.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Cessation
of interest.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money (a).

(a) See *Deo Dat v. Ram Autar* (I. L. R., VIII All., 502).

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1882.SECTION
85.

Parties to
suits for
foreclosure,
sale and
redemption.

Suits for Foreclosure, Sale or Redemption.

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

This section seems to require that prior mortgagees should be joined as parties to a suit by a puisne mortgagee, but neither a surety nor a judgment-creditor need apparently be added as parties, nor the mortgagor, in a suit between mortgagee and sub-mortgagee (*a*). It seems, although the section is not very clearly worded, that a person having an interest in the mortgaged property cannot be bound by a decree made in his absence, although not made a party to the suit by reason of the plaintiff's not having notice of the interest. But it seems that in the absence of fraud he can only unravel the accounts by proving particular errors. (*Needler v. Deeble*, 1 Ch. Ca., 299; *Godfrey v. Chadwell*, 2 Vern., 601.)

If all necessary parties to the action are not before the Court, the objection ought to be taken at once. But even if no such objection is taken, and the fact only comes out in the course of the hearing, the plaintiff will not be permitted to proceed. He may, however, have leave to amend, which may apparently be given at any time before the final decree has been drawn up. (*Keith v. Butcher*, 25 Ch. D., 750. See also *Campbell v. Holyland*, 7 Ch. D., 166. The latter case, however, cannot be regarded as a precedent under this Act.) But if the action is allowed to proceed, and a decree is obtained by the plaintiff, it will be binding on those who are parties to it. In England, if the first tenant in tail of the equity of redemption be a party to the action, the decree will bind the remainderman, in the absence of fraud or collusion; and the principle will probably be followed in this country in the case of a Hindu widow, where the mortgage was created by the husband. (Distinguish *Nugender Ghose v. Kamini*, XI Moore's Ind. App., 241; where the claim was in respect of a charge made by the widow. Cf. *Mohima v. Ramkishore*, XXIII Suth. W. R., 174.)

As to the necessity of making all persons having an interest in the mortgage security or in the equity of redemption parties to suits under this chapter, the following cases may be referred to in addition to those cited at pp. 136—140, 215—217, 247—249, *ante*. (*Hughes v. Delhi and London Bank*, I. L. R., XV Cal., 35; *Kaliprosouno v. Kamini*, I. L. R., IV Cal., 475; *Daulat v. Mehr Chand*, I. L. R., XV Cal., 70; *Khub Chand v. Kalian*, I. L. R., I All., 240; *Bishan v. Manni*, I. L. R., I All., 300; *Ali Hasan v. Dhirja*, I. L. R., IV All., 518; *Sita Ram v. Amir Begam*, I. L. R., VIII All., 324; *Kadir Baksh v. Salig Ram*, I. L. R., IX All., 474; *Muhammad v. Man Sing*, I. L. R., IX All., 125; *Lachman v. Salig Ram*, I. L. R., VIII All., 384; *Narayan v. Pandu-*

(*a*) The section, however, may fairly be read as applying only to puisne claimants on the mortgaged premises. In England, a mortgagee *eisne* is not a necessary party to a suit by mortgagee *puisne*, unless the amount due to the latter cannot otherwise be ascertained. (Coote, p. 1162.)

rang, I. L. R., V Bom., 685; *Ragho v. Balkrishna*, I. L. R., IX Bom., 128; *Nanjandepa v. Gurulingapa*, I. L. R., IX Bom., 10; *Dullubhas v. Lakshmandas*, I. L. R., X Bom., 88; *Naro Hari v. Vithalbhat*, I. L. R., X Bom., 648; *Mohan Minor v. Togu Uka*, I. L. R., X Bom., 224; *Bhaudin v. Shekh Ismail*, I. L. R., XI Bom., 425; *Ram Bahsh v. Mohunt*, XXI Suth. W. R., 428; *Anundo Moyee v. Dhonendro*, XIV Moore's Ind. App., 101; *Braja Nath v. Khilat Chandra*, VIII Beng. L. Rep., 104; *Ariyaputri v. Alamelu*, I. L. R., XI Mad., 304; *Gausavant v. Narayan*, I. L. R., VII Bom., 467; *Punchan v. Mungle*, II Agra H. C. Rep., 207; *Bhoop v. Nursing*, III Agra H. C. Rep., 144; *Hurdeo v. Guneshee*, I Agra H. C. Rep., 36; *Rambahsh v. Ram Lall*, XXI Suth. W. R., 428; *Mahomed v. Dhundur*, XXV Suth. W. R., 39; *Blaquiere v. Ramdhons*, Bourke, O. C., 319; *Doolay v. Goolam*, II All. H. C. Rep., 72; *Damodhar v. Kahan Dass*, VIII Bom. H. C. Rep., 1; *Krishna v. Hurry*, XXV Suth. W. R., 60; *Mujeed v. Dildar*, XIV Suth. W. R., 216.)

It ought to be mentioned that a defendant to a foreclosure action, although properly made a party in the first instance, will be entitled to his costs which may have been incurred by him after a proper offer to disclaim and to be dismissed from the suit. In the case of *Greene v. Forster* (22 Ch. D., 566), where the right of a puisne mortgagee to his costs was disputed on the ground that the plaintiff was entitled to the delivery up of deeds of subsequent date to his own mortgage, and which dealt only with the title to the equity of redemption, the Court refused to depart from the ordinary rule on the ground that the plaintiff was not entitled to any such order.

Foreclosure and Sale.

86. In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

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86.

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It is scarcely necessary to point out that there can be no foreclosure until default has been made by the mortgagor so as to entitle the mortgagee to call in the mortgage-money. If no time is fixed for payment in the deed, the mortgagee may demand payment at any time, and if the debt is not then paid, may proceed to foreclose. In English mortgages, there is frequently a covenant not to call in the money during a certain term. If the covenant is absolute, there can be no foreclosure till the term expires. But if, as is generally the case, the covenant is subject to the condition that the interest shall be regularly paid by the mortgagor, he may be foreclosed at any time after default in payment of interest (a). But the default may, of course, be waived. The same observation will apply to the other covenants of the mortgagor, if any, contained in the mortgage-deed. In other words "whenever that has occurred by reason of which the mortgagor has lost his right under the deed to call for a reconveyance of the property, and he can only get back the mortgaged premises by virtue of the right of redemption which the Court of Equity still preserves to him, then also that Court allows the mortgagee to come in and insist that the mortgagor shall elect between the exercising of this right of redemption and being foreclosed." (*Per Phear, J., in Shoroshee Bala v. Nundalall*, XIII Suth. W. R., 364).

It seems that a covenant not to call in the money during a definite period will prevent the mortgagee during the term from suing not only in respect of the mortgage-debt, but also in respect of any claims which he may have against the mortgagor in respect of the security, as for payment of rent or any other outlay in respect of the mortgaged premises. (*Fisher's Mortgage*, p. 330.) It is hardly necessary to state that a mortgagee will not be prevented by an administration suit from proceeding with his remedies against the mortgaged premises. (*Kristomohiny v. Bama Churn*, I. L. R., VII Cal., 733.)

I have already pointed out the mode in which accounts are taken, in an action either for foreclosure or redemption, and that neither the mortgagee nor the mortgagor is at liberty to withdraw from the taking of accounts when they appear to be going against him (b). This is distinctly laid down in the case of *Doolee v. Omda* (I. L. R., VI Cal., 377), in which it is pointed out that the essence of foreclosure and redemption suits is that each party is entitled in such suits to enforce his rights, and that if the balance is against any party, he must pay it. In the same case where the mortgagee claimed to have been in possession under an agreement distinct from his mortgage-title, under which he obtained a decree in May 1862, the Court, in laying down the principle on which the accounts should be taken, observed:—"We are of opinion that an account should be taken half-yearly of the interest due from the mortgagor under the mortgage-deed, and that, from such half-yearly amounts of interest, should be deducted the rent payable, but unpaid by the mortgagee during such half-year under any contract for possession, separate and independent of the mortgage; and if, for any period the mortgagee was in possession,

(a) As to the usual covenants in a properly drawn mortgage, see *Manickya v. Baroda* (I. L. R., IX Cal., 355.)

(b) Cases, however, may occur in which the Court would be justified in staying proceedings, for instance, where the accounts are asked for vexatiously and unreasonably. (*Taylor v. Mostyn*, 25 Ch. D., 48.)

rent became due under any such separate or independent contract, during such period, he should be charged as a mortgagee in possession. The balance of interest half-yearly (if any) will not carry interest up to the date of the decree. But an account must be made up, as on the date of the decree of the 12th May 1862, of the principal and interest, after making such deductions as I have mentioned, due to the plaintiff at that time. Upon that aggregate amount interest will again be calculated at one per cent. per mensem, and against the subsequent half-yearly accounts must be set off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession, separate and independent of the mortgage; and for any period uncovered by such separate and independent contract, such a sum as should be charged against a mortgagee in possession.

"The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the plaintiff; the mortgagee. On the other hand, if a balance is found due from the plaintiff, the mortgagee, to the defendant, the plaintiff must pay such balance to the defendant." (As to the circumstances under which a settled account may be re-opened, see *Eyre v. Hughes*, 2 Ch. D., 148; *Daniell v. Sinclair*, 6 App. Cas., 181.)

I ought to add that when the mortgagee has been overpaid, he may be ordered to pay the balance due from him with interest from the date of the institution of the suit. And this is stated to be the general practice in *Janoji v. Janoji* (I. L. R., VII Bom., 185), on the authority of Seton's well-known Treatise on Decrees (a). (Cf. *Quarrell v. Beckford*, 1 Mad., 269; where it is put on the ground that the demand was made at the time of the filing of the bill, and ought to have been then complied with.) In the recent case of *Charles v. Jones* (35 Ch. D., 544), a stricter view of the liability of the mortgagee was, however, taken by the Court. It is true that the claim in that case related to the surplus proceeds which were retained by the mortgagee after a sale under a power. But the observations of the learned Judge are very general. The mortgagee, it is said, takes his mortgage as a security for his debt, and has therefore no right to be in possession of the estate after he has paid himself what is due to him. He then holds the property for the benefit of the mortgagor. His duty is then to say, 'I have paid my debt, the surplus does not belong to me, and I wish to hand it back to the person to whom it belongs.' The Court further observed that it is the duty of the mortgagee to set apart the surplus in such a way as to be fruitful for the benefit of the person entitled to it, and to whom, to that extent at least, the mortgagee stands in a fiduciary relation. (See also *Wilson v. Metcalfe*, 1 Russ., 530; *Ashworth v. Lord*, 36 Ch. D., 545.)

I have already stated that you cannot imply a contract to pay a certain rate of interest as such. But a plaintiff may recover interest by way of damages, although there is no express contract to that effect. In the case of *Mansab Ali v. Gulab Chand* (I. L. R., X All., 85), a very important distinction is drawn between the interest payable on a mortgage as such, and damages recoverable by the plaintiff by reason of the wrongful withholding of the principal sum. I may, however, be permitted to observe that this distinction which may be followed by very

(a) This rule, however, was not followed in the above case, which was governed by the Deccan Agriculturists' Relief Act.

ACT IV OF 1882. serious consequences to the mortgagee, could hardly have been present to the mind of the author of this Act in which we find the word interest

SECTION used throughout without reference to any such distinction. An examination of the English cases will also, I venture to think, show

86.

that damages payable by reason of default of payment at a fixed day are generally known by the name of and treated as interest. In *Caledonian Ry. Co. v. Carmichael* (Law Rep., 2 H. L., Sc., 56, 66), Lord Westbury says:—"Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid." (See also Fisher's Mortgage, pp. 879-880, and the cases cited there.) (a) Similar language has been employed by other learned Judges and adopted by the legislature in this country in Act XXXII of 1839, which is based upon the well-known English Statute (3 and 4 Will. IV, c. 42.) The only substantial difference, therefore, it seems to me between interest as such and damages in the nature of interest consists in the fact that in the one case the debtor is bound by the terms of his contract, while in the other some measure of discretion is vested in the Court. But the damages, it is submitted, ought to be regarded as part of the mortgage-debt just the same as the interest due to the creditor under the terms of an express agreement. (*Deen Doyal v. Het Narain Singh*, I. L. R., II Cal., 41.)

And this brings me to another vexed question—I mean the distinction between interest and a penalty, a question on which, as observed by Jessel, M. R., it is not unlikely that learned Judges will differ in future as they have differed in times past. It is impossible to reconcile the various reported cases on the subject, as a very thin line would seem to divide the two. The only principle that can be safely deduced from the authorities is that, since the repeal of the usury laws, a person is free to contract to pay any rate of interest that he chooses upon money borrowed by him, although, even on this point, we can trace in some at least of the reported cases the influence of that half conscious repulsion to the doctrines of political economy to which Sir Henry Maine alludes. (*Village Communities*, p. 195. See *Chuhar v. Mir*, I. L. R., II All., 715; *Kharag v. Bhola*, I. L. R., IV All., 8; *Dipnarain v. Dipan*, I. L. R., VIII All., 185, which lays down that interest at an increased rate as well as compound interest cannot both be recovered; *Bansi v. Buali*, I. L. R., III All., 260, where Stuart, C. J., says "the condition as to interest by its very enormity writes itself down as a penalty." Cf. *Venkitta v. Kumba*, I. L. R., I Mad., 349. But see *Chhab v. Kamla*, I. L. R., VII All., 333; *Baldeo v. Gokal*, I. L. R., I All., 603) (b).

We must remember that equity, of which very vague notions are sometimes entertained, cannot relieve a debtor from the performance of his agreement simply because the interest is exorbitant. There must be something more to entitle a person to relief, for instance, that the parties were not on an equal footing or some other circumstance tending

(a) In England, interest, though not expressly reserved, is payable on a mortgage-debt (Fisher, p. 878); but the practice in this country would seem to be different. (See the cases cited in Macpherson, p. 114.)

(b) It may be noted that in the last two cases the Court thought that there was a sufficient covenant to pay interest at the stipulated rate so long as the money was not repaid, although there were no distinct words to that effect in either of the two deeds.

to prove fraud or undue influence. (*Mackintosh v. Wingrove*, I. L. R., ACT IV OF 1882. SECTION 86. IV Calc., 137; *Lalli v. Ram Prosad*, I. L. R., IX All., 74. Distinguish *Mackintosh v. Hunt*, I. L. R., II Calc., 202; *Kamini v. Kali*, I. L. R., XII Calc., 225; and the cases cited in the report). Some at least, if not all of the cases to the contrary appear to be based on the practice of the English Court of Chancery, as to which Lord Justice Lindley in a recent case said "whether relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said; that it was too absurd; or whether relief was given by reason of the usury laws, I do not know; it is an antiquarian research which I have not prosecuted." (*Wallis v. Smith*, 21 Ch. D., 274.) In the same case Jessel, M. R. observed:—"I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character."

The Indian Contract Act has swept away the historical if somewhat inconvenient distinction between a penalty and liquidated damages, and has no doubt to a certain extent restrained freedom of contract. The effect of the section was considered by the Calcutta High Court in *Mackintosh v. Crow* (I. L. R., IX Calc., 689), and a distinction was drawn between an agreement to pay an increased rate of interest from a future day and an agreement to do so from the date of the bond, the former being regarded as a substantive part of the contract, and the latter only in the nature of a sum named in the contract within the meaning of sec. 74 of the Indian Contract Act. (See also *Mathura Persad v. Luggon Koer*, I. L. R., IX Calc., 615; *Sungat Lal v. Baijnath*, I. L. R., XIII Calc., 164; *Jagana v. Raghu*, I. L. R., IX Mad., 276; *Rasaji v. Syana*, VI Bom. H. C. Rep., 7; *Matoji v. Husen*, *Ibid.*, 8; *Vengid v. Chatu*, I. L. R., III Mad., 224; *Vythi v. Ravana*, I. L. R., VI Mad., 167; *Bansi v. Buali*, I. L. R., III All., 261; *Khurram v. Bhowani*, I. L. R., III All., 440; *Mazhar v. Sarder*, I. L. R., II All., 769; *Khorag v. Bhola*, I. L. R., IV All., 8.)(a).

In the case of *Baijnath Sing v. Shah Ali* (I. L. R., XIV Calc., 248), however, the Court refused to follow the foregoing decisions upon the ground that an agreement to pay an increased rate of interest was not regulated by sec. 74 of the Contract Act, but by sec. 2 of Act XXVIII of 1855, and the decision of their Lordships of the Privy Council in *Balkissen v. Run Bahadoor*, (I. L. R., X Calc., 305,) was referred to in support of this view. A stipulation to pay a certain rate of interest and a higher rate in default of payment at a fixed time could not, it was pointed out, be regarded as "naming a sum" payable in case of breach, but simply amounted to fixing two different rates of interest payable under two different sets of circumstances. (*Arjan v. Asgar*, I. L. R., XIII Calc., 200; *Basavayya v. Subba*, I. L. R., XI Mad., 294; *Banwari v. Muhammad*, I. L. R., IX All., 690; *Narain v. Chait*, I. L. R.,

(a) It is, however, worthy of notice that the distinction drawn by the Calcutta High Court is not noticed in any of the Allahabad cases.

ACT IV OF VI All., 179; *Bhola v. Fateth*, I. L. R., VI All., 63; *Kunj v. Ilahi*, 1882. I. L. R., VI All., 64; *Arulu v. Waku*, II Mad. H. C. Rep., 205).

SECTION 86. It may also be added that to apply sec. 74 to agreements to pay an increased rate of interest would be scarcely consistent with a well-known canon of construction which says that special Acts are not repealed by general Acts. "In passing special Acts," says Wood, V. C., "the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special Act they had thus carefully supervised and regulated." (*Fitzgerald v. Champneys*, 2 J. & H., 54, 55.)

Then, again, it seems to me that an agreement to pay an increased rate of interest if the debtor does not pay at a certain time, is substantially the same as an agreement to pay the higher rate reducible in the case of punctual payment to a lower rate; an agreement which seems to me perfectly unobjectionable, and against which equity ought not to relieve if the early day be suffered to pass without payment. It is true that a distinction is made by the English Court of Chancery between these two agreements; but a very eminent Equity Judge in speaking of this practice said: "I am sorry it was so settled, because anything more irrational than the doctrine, I think, can hardly be stated. It entirely depended on form and not on substance." (*Per Jessel, M. R., in Wallis v. Smith*, 21 Ch. D., 261.)

As the authorities now stand, an agreement to pay a higher rate of interest will not be regarded as a penalty, merely because it is payable from a date prior to default. It only amounts to the substitution of a higher for a lower rate of interest in a given state of circumstances. I should have thought that the judgment of their Lordships in *Bal-kissen v. Run Bahadoor* (I. L. R., X Calc., 305), was conclusive on the question that such an agreement was not penal; but it has been suggested in some recent cases that there may be a distinction between an agreement to pay interest as such, and one to pay compensation or damages for the non-payment of the principal or interest as the case may be at the appointed time. (*Banwari v. Muhammed*, I. L. R., IX All., 690; *Basavayya v. Subba Raju*, I. L. R., XI Mad., 294). It seems to me, however, with the greatest respect, that this distinction by introducing the element of reasonableness in such cases is open to the objection which has been made to Judges putting a different meaning on a contract from that expressed by the parties themselves.

I ought to mention that it has been suggested that the Court may properly regard an agreement as penal, although it provides for the payment of interest, if the clause was intended not to regulate the terms on which the loan was to continue, but only to prevent its continuance by imposing a penalty for the default. The proposition may be sound in principle, but I fear it cannot be applied in practice without arming the Court indirectly with a power to regulate the terms on which money should be lent.

It is necessary to state that the rule of Hindu Law known in Bombay as the rule of *Damdapat* as a part of the Hindu Law of Contract, is the law as between Hindus in the High Court in its ordinary original civil jurisdiction. (*Nobin v. Romesh*, I. L. R., XIV Calc.,

781.) (a) But the rule will not be applied in the case of a mortgagee in possession when the account is taken on both sides, the mortgagee being debited with the rents and profits. (*Nathu Bhai v. Mulchand*, V Bom. H. C. Rep., 196.) But no exception will be made when the account is ordered against a person not as mortgagee in possession, but by way of mesne profits as against a wrong-doer.

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The only other point in connection with the question of interest, it is necessary to state, is that, although ordinarily notwithstanding a covenant to pay interest at a certain rate so long as the principal or any part of it remains unpaid, interest at such rate can only be claimed as of right only down to the institution of the suit, it seems that in taking the accounts under this Act, the well-known practice of allowing the mortgagee interest at the stipulated rate down to the date of the final order for foreclosure or sale will be followed by the Court. (Belchambers's Practice of the Civil Courts, p. 333. *Vithal v. Dhondi*, Bom. P. J. 1884, p. 44.)

It may be observed that the period of six months usually allowed to the mortgagor to redeem may be curtailed if the mortgagor is willing to exercise his right at an earlier period in order to avoid the payment of interest for the intervening period to the mortgagee. (*Nazir v. Mehidi*, VII Calc. L. Rep., 206; *Chotoollall v. Miller*, VII Calc. L. Rep., 267.)

Neither this section nor the other sections in the Act relating to suits for sale or redemption deal with the case of several successive mortgagees. In such cases, the second mortgagee has the first right to redeem and is liable to be foreclosed in default of payment. The second mortgagee being thus removed out of the way, an account is taken of the subsequent interest and costs due to the first mortgagee, the third mortgagee being entitled to redeem on payment of such interest and costs together with the amount originally certified to be due to the first mortgagee. In default, he is in his turn liable to be foreclosed, and the same process is followed in respect of the other mortgagees until the mortgagor himself is reached, when he will have the option of redeeming the mortgage or will be foreclosed, the estate in the latter case being vested in the mortgagee free from all incumbrances (b). I ought to state that in the event of a puisne mortgagee redeeming an earlier mortgage, a subsequent mortgagee will be entitled to redeem only on payment of the debt due to the mortgagee who redeems the property on his own security, together with the money paid by him as the price of redemption. It is scarcely necessary to add that the debt due to the mortgagee will include payments which the mortgagee has a right to treat as part of the mortgage-debt.

(a) In this case the rule of Hindu Law was applied, although it was clear from the directions given by the learned Judge by whom the accounts were ordered, that the question was not present to his mind.

(b) As to the mode of computing interest in such cases, see *Elton v. Curteis* (19 Ch. D., 49.) I ought to mention here that the present tendency of the Court is to give but one time to redeem. (*Smith v. Olding*, 25 Ch. D., 462; *Mutual &c. Society v. Langley*, 26 Ch. D., 686; *Platt v. Mendel*, 27 Ch. D., 246; *Doble v. Manley*, 28 Ch. D., 664.) As to the circumstances under which an immediate decree for foreclosure may be made, see *Wolverhampton &c. Co. v. George* (24 Ch. D., 707.) For a form of decree where the action combines both a claim on the covenant and a claim for foreclosure, see *Farrer v. Lacy & Co.* (25 Ch. D., 636; C. A., 31 Ch. D., 42), *Hunter v. Myatt* (28 Ch. D., 181).

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The right of a mortgagee who redeems a prior mortgage to claim from a subsequent incumbrancer not only the price of redemption, but also the amount due to himself will not, it seems, be taken away or in any way qualified by the mere fact that his mortgage includes only a part of the property comprised in the prior security. The question was discussed very fully in a recent English case (*Mutual &c. Society v. Langley*, 32 Ch. D., 460). The facts were shortly these: A mortgagor who was entitled to a reversionary interest in the residuary estate of a testator and also to a life interest in certain sums of money, mortgaged both his reversionary and life interests to different persons before 1872 when he mortgaged his reversionary interest alone to the defendant Langley. The mortgagor afterwards made five subsequent mortgages of his life interest to the plaintiffs, who subsequently took a transfer of the securities prior to the defendant's mortgage of 1872. An action having been brought for foreclosure of the reversionary and life interest, it was held that, although the defendant's mortgage included only one property, he was entitled, on paying off the mortgages which were prior to his own security, to an assignment of both the properties, and not simply of that on which the debt due to himself was secured. In giving judgment Lord Justice Cotton said:—"Just let us see what the position of Mr. Langley was before the plaintiffs took their subsequent mortgages on the life interest. He had a mortgage only on the reversionary interest. Then he would have been foreclosed at the instance of the first mortgagees of the two classes of property, unless he paid off the entirety of their debt and, if he paid off the entirety of their debt, there being no subsequent mortgage, and the only interest being that of the mortgagor, he would have been entitled to have handed over to him the entirety of the property which was a security for those debts. It is very true that he had no interest whatever in the life estate, he had an interest only in the reversionary property; but if he wished to redeem, or wished to avoid foreclosure, he must pay off the entirety of the debt due to the prior incumbrancer upon the property mortgaged to him, and also upon the other property. It would have been the right of the first mortgagee to require this, and it would have been his right if he had wished to redeem on this footing. That being so, subsequently to that, the plaintiffs got a mortgage upon the life interest, and upon the life interest only. In my opinion by so dealing with the life interest, the mortgagor could not alter or vary the rights which, not by contract, but from his position, as a matter of equity arising from that position, Mr. Langley was entitled to, previously to the time when the mortgagor granted the subsequent mortgage to the plaintiffs. In my opinion it is not a question of tacking, and it could not be supported upon that. Nor is it a question of consolidation. It does not rest upon either of those two grounds, but upon the principle that nothing which the mortgagor could subsequently do by dealing with the equity of redemption could interfere with or prejudice his prior mortgagee, Mr. Langley. In my opinion the decision was wrong, and the proper form of decree will be upon the defendant paying whatever is due upon the previous mortgages, both of the life interest and the reversionary interest, he may redeem both those properties and have them assigned to him. When he has done that, so far as the plaintiffs are the next incumbrancers to him, they will be entitled to redeem him.

"I do not think it is necessary to go through all the cases. The principle has been enunciated in those consolidation cases, that nothing

which the mortgagor, the owner of the equity of redemption, may do, can prejudice the position of his previous mortgagee, so as to subject him to greater responsibilities, or subject him to a greater burden than he would have had but for those dealings with the equity of redemption. It is said that that is immaterial, and that Mr. Langley is getting something as to which he had no security whatever. Now he is getting it simply in this way—to avoid foreclosure, and in order to redeem and to make himself first incumbrancer, he is entitled to pay off, and he may be required to pay off, not part only, but the entirety of the mortgages, and the debts due upon the previous mortgages; and if he pays off the entirety of the debts, or can be compelled to do so, in my opinion it would be wrong to give him part only of the property upon which the debts were secured.”

Lord Justice Fry added: “With regard to the first point, it appears to me that the plaintiffs can obtain no better rights for their mortgage of 1876 than the mortgagor himself had at that time. Now how do the facts stand at that time? At that time the mortgagor had not only mortgaged to the five earlier mortgagees from whom an assignment has been taken by the plaintiffs, but he had mortgaged to the defendant Langley. He had mortgaged to Langley the reversionary property, and that placed Langley in this position. He was liable to have his interest in that property foreclosed, by the prior mortgagees, who were for the most part mortgagees not only of the reversionary interest in the property but of the life interest of the mortgagor; and, by parity of reasoning, he had a right to redeem both those sets and take an assignment of both those properties upon paying off the prior mortgages. It appears to me that the mortgagor had no power to create any interest which would interfere with or infringe that right of Langley, and further, that if the respondents’ contention were to prevail, it would follow, as they admit it does follow, that Langley would be deprived on payment off of the prior mortgages of part of the security, and he would only be entitled to take an assignment of the reversionary property; and payment off of the prior mortgages would enure for the benefit of the subsequent mortgagee, and make him the first mortgagee of the life interest. That would be a very startling conclusion, and I think it is only based upon a line of argument that is inconsistent with the rights of the parties, because the mortgagor was unable to place the plaintiffs in any better position than he himself was in. He could not interfere with Langley’s right, and therefore his subsequent mortgagees cannot interfere with his right.” (See also the Minutes of the Decree in the Report.)

Now, although the contention of the plaintiffs that the defendant had no right to an assignment of any parts of the property on which he had no security unless he paid off the subsequent mortgages on those portions, was not wholly reasonable, it cannot be denied that the above judgment of the Court of Appeal virtually gives the mortgagee of one property only an advantage over subsequent incumbrancers which was never bargained for by him. No doubt, if there is a well-established rule to that effect, there can be no injustice in enforcing it, as the subsequent mortgagees may be presumed to have taken their securities subject to the well-known equity of the prior mortgagee to an assignment of the whole of the properties comprised in the first security. But in the absence of any such established rule, I venture to think his right to such an assignment is not so obvious. This

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ACT IV OF 1882. SECTION 86. — will appear if the rights of the parties are worked out by a decree for sale instead of foreclosure. Thus, suppose there is a first mortgage for Rs. 30,000 on two properties, A. and B., A being worth Rs. 50,000 and B only Rs. 10,000. Suppose a second mortgage on B only for Rs. 30,000, and then a third mortgage on A for Rs. 25,000. According to the decision in *Mutual &c. Society v. Langley*, the second mortgagee by redeeming the first would be entitled to throw both the debts on A. and B., and thus protect himself from any loss. But *ex hypothesi* the equity of redemption of B., which was his only security, was worth on a ratable distribution of the first mortgage-debt only Rs. 5,000, while the equity of redemption of A. was worth Rs. 25,000. The result, however, is that the second mortgagee is satisfied, although his security was manifestly insufficient, while the third mortgagee notwithstanding the sufficiency of his security is 'squeezed out.' Under a decree for sale, however, the sale proceeds would be ratably distributed. The first mortgagee would get Rs. 30,000, the second Rs. 5,000 and the third Rs. 25,000. (See the Minutes of the Decree in *Barnes v. Ruessler*, Fisher's Mortgage, p. 1006.)

I may here be permitted to observe that in complicated cases the rights of the parties can be adequately protected only by a decree for sale; foreclosure being both a cumbrous and dilatory method of procedure. Indeed, it was proposed at one time to do away with foreclosure altogether, and to give the mortgagee only the right to realize his security by a sale of the pledge. But it was thought by the then Law Member of the Governor-General's Council that the amount of simplicity gained would not justify the amount of disturbance created. (Stokes's Anglo-Indian Codes, I, p. 738.) I, however, venture to doubt whether the slight disturbance created by such a law would have been too dear a price to pay for the elegance and simplicity which the measure would have given us. The gain to the community would have been sufficient compensation for any possible disturbance. The right of a mortgagee to foreclose, we should remember, naturally grew in England out of the form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for a re-transfer upon due payment of the debt, probably the rudest method, as Professor Holland points out, in which security can be given for the fulfilment of an engagement. Both in America and in Ireland sale is regarded as the appropriate remedy on a mortgage. The same practice is followed in countries which have adopted the Roman Law as the basis of their jurisprudence. In English Law, however, the more cumbrous mode of proceeding has stood its ground down to the present day, but the assertion may be hazarded without rashness, that foreclosure with its successive periods of redemption, its liability to be re-opened, and the manifest inadequacy of the remedy in complicated cases is doomed even in England, a country, the jurisprudence of which sometimes reminds the lawyer of the words, half in playfulness, half in earnest, in which Arnold speaks of his beloved University of Oxford.

The decree for foreclosure determines the respective priorities of the several incumbrancers, and may also in a proper case define the rights of persons having paramount claims on the estate (*Jones v. Griffith*, 2 Coll., 207). Cases of foreclosure furnish an exception to the general rule that the losing party pays the costs. In the case of incumbrancers as an ordinary rule the costs are allowed to be added to their securities, if any difficult questions arise as to priority or the

like; and unless there has been something vexatious or unusual in their conduct, they get their costs if the fund is sufficient to pay them. (*Johnstone v. Cox*, 19 Ch. D., 17).

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An account, as I have already stated, is taken, where the mortgagee has been in possession, not only of the rents received by him but also of the profits which might have been received without wilful default on the part of the mortgagee. If the mortgagee was in occupation himself, he is liable to pay a fair rent. Any sums expended by the mortgagee in necessary repairs and improvements are deducted from the rents and profits, the balance being applied first in payment of the interest and then in sinking the principal. (*Thornecroft v. Crockett*, 2 H. L., 246.) The Act is silent as to annual rests, and I presume that the old practice will be still followed. Payments made in respect of or for the protection of the security or of the estate, will be treated as on the same footing with payments made in respect of necessary repairs.

I ought to add that where one person has mortgaged his estate as a surety for another, the decree should be carefully framed for the purpose of protecting the rights of the surety. In such case, according to the practice of the English Court, the decree directs that in the event of the money being paid by the principal debtor, the estates shall be conveyed to their respective owners. But if the money is paid by the surety, both the estates are conveyed to him, the principal debtor being, of course, at liberty to redeem that which belongs to him. If neither principal nor surety redeems the mortgage, both their estates are foreclosed. (*Coote's Mortgage*, 1093.)

It seems that if the mortgagee intends to set up a claim for improvements or substantial repairs, the material facts in support of the claim should be stated in the plaint. (*Sandon v. Hooper*, 6 Beav., 246.) But any sums of money which may be claimed as just allowances will be allowed to the mortgagee in taking the accounts, although there may be no specific claim for such monies in the plaint nor any express direction in the order directing the accounts to be taken (a).

If the mortgagor seeks to charge the mortgagee with any losses sustained by him owing to the failure by the mortgagee to perform any of the duties imposed upon him by sec. 76 of this Act, he must state in his defence the material facts relied upon by him in support of his claim in order that the question may be disposed of at the trial and special directions given by the Court in the order directing an account. (*Daniell's Chancery Practice*, p. 1389.)

87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Procedure
in case of
payment of
amount
due.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all

Order abso-
lute for
foreclosure.

(a) As to what are just allowances, see *Wilkes v. Saunton* (7 Ch. D., 188); *Tipton &c. Co. v. Tipton &c. Co.* (7 Ch. D., 192); 2 Seton, 1079—1081. Distinguish *Rees v. Metropolitan &c. Works* (14 Ch. D., 372.)

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right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Power to
enlarge
time.

Provided that the Court may, upon good cause shewn and upon such terms, if any, as it thinks fit, from time to time, postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, for the words "Final decree," the words "Decree absolute" shall be substituted.

It appears that under the last clause of this section an order for foreclosure absolute operates as a discharge of the debt secured by the mortgage. A mortgagee, therefore, who obtains such an order will be precluded from bringing a second action against the mortgagor on the covenant; a proceeding which, although allowed in the English law, is attended with the inconvenient result of re-opening the foreclosure decree.

According to the English practice, the decree for foreclosure does not relate back to the judgment for an account, and the security is converted into land only from the date of the order absolute. (*Thompson v. Grant*, 4 Mad., 438.) In the case of *Rakhal v. Dwarka* (I. L. R., XIII Calc., 346,) however, the Calcutta High Court was of opinion that, after the passing of an order *nisi*, "it would be as difficult to hold that the property still belongs to the mortgagor, as it would be to hold that it is the property of the mortgagee." (a)

In England, the order for foreclosure absolute is obtained on motion, of course supported by the affidavit of the plaintiff or of his solicitor of due attendance at the appointed time and place and of non-payment by the mortgagor of the amount certified to be due. (*Daniell's Chancery Practice*, p. 1405.) In this country, the defendant has the option either of paying to the plaintiff or into Court. It seems, therefore, the attendance of the plaintiff or of his agent is not absolutely necessary.

It has been said that the order absolute for foreclosure will operate as a discharge only of the mortgage-debt, but not of the costs, which may be recovered by the mortgagee like other judgment-debts from the mortgagor. But however that may be, it is certainly competent to the Court under sec. 220 of the Civil Procedure Code to award the costs personally against the mortgagor, and the right of the mortgagee to realise his costs separately will therefore depend upon the terms of the decree. (*Rutnessur v. Jusoda*, I. L. R., XIV Calc., 185; *Damodar v. Bulh*, I. L. R., X All., 179.) I ought to state that when a mortgagee brings an action to foreclose two mortgages of two distinct estates, the costs of the action are not to be charged against each

(a) *Quære*.—Might not the difficulty which pressed upon the Court be met by allowing the mortgagee to use the name of the mortgagor in the proceedings on offering a proper indemnity?

estate, but should be apportioned ratably between the two. (*De Cauz* ACT IV OF 1882. *v. Skipper*, 31 Ch. D., 635.)

It seems, although the authorities are not quite consistent on the point, that if the time prescribed by the Court for payment of the mortgage-money expires on a holiday, the mortgagor will be entitled to make the deposit on the first day that the Court re-opens. (See *ante*, pp. 264—266. Cf. *Hossein v. Donzelle*, I. L. R., V Calc., 906; *Mayer v. Harding*, L. R., 2 Q. B., 410; *Gujadhar v. Naih*, I. L. R., VIII Calc., 528.)

It is scarcely necessary to point out that an appeal will lie only from a formal adjudication by the Court, and not merely from a ministerial order. (*Hulas v. Pirithi*, I. L. R., IX All., 500.) An order granting or refusing an extension of time will, however, be appealable under the Code. (I. L. R., IX All., 502, note.)

The order *nisi* in a foreclosure action would seem to be a decree for the purpose of an appeal from it, and not merely an interlocutory order. This practice is followed in the Calcutta High Court and is in accordance with the rule laid down in *Smith v. Davis* (31 Ch. D., 595).

As to what constitutes good cause within the meaning of the proviso to sub-sec. (1), see the judgment of Jessel, M. R., in *Campbell v. Holyland* (7 Ch. D., 166.) I ought, however, to add that the practice of the English Court of Chancery upon which the judgment is based, is unduly indulgent to the mortgagor: as not only may the period for redemption be enlarged before an order for foreclosure absolute but the decree itself may be re-opened in the discretion of the Court. It seems that the present Act, while leaving to the Court a large discretion as regards extending the time for redemption before the mortgage is finally foreclosed, does not authorize the re-opening of the decree after an order of foreclosure absolute. The usual conditions upon which the time will be enlarged will probably be the same as those imposed on the mortgagor in England, *viz.*, payment within a limited time of the sum due for interest and costs, and carrying on the account of subsequent interest and costs. (*Daniell's Chancery Practice*, p. 1406.) But if the time has to be enlarged owing to the neglect of the mortgagee to proceed under the decree, the Court will refuse to allow him interest subsequent to the original day named for payment. (See the cases cited in *Belchambers*, p. 339.)

The time to redeem may also be enlarged on terms pending an appeal. (*Monkhouse v. Corporation of Bedford*, 17 Ves., 380. Cf. *Constable v. Howick*, 5 Jur., N. S., 331.) And the mortgagor ought to apply for such an order whenever the period is likely to expire before the appeal is heard. It is true, it has been said, that where the decree of an inferior Court directing something to be done within a specified period is confirmed in appeal, the time is to be reckoned from the date of the appellate decree. (*Doulut v. Bhukundas*, I. L. R., XI Bom., 172, citing *Noorali v. Koni*, I. L. R., XIII Calc., 13.) But as pointed out by Mr. Justice West, the proposition presents not a little difficulty.

I ought to mention that if the mortgagee receives any rents between the date of the certificate and the time appointed for the payment of the mortgage-money, a fresh account must be taken and a new day named for payment. The receipt of rents by a Receiver appointed by the Court ought not, however, to have any such effect. The reason for this distinction is that where a Receiver has been appointed, the

ACT IV OF 1882. matter is taken out of the hands of the mortgagee, who cannot prevent the Receiver from realising the rents. It is, however, open to the mortgagor before the order absolute is made, to apply that the money in the hands of the Receiver may be paid in reduction of the debt, and for liberty to redeem on payment of the balance. The mortgagee, of course, cannot claim the money in the hands of the Receiver as well as the amount originally certified to be due to him. But the case is different where the money is received not as rents and profits, but in respect of minerals or other things which are part of the inheritance. (*Coleman v. Llewellyn*, 34 Ch. D., 143; *Webster v. Patleson*, 25 Ch. D., 626; *Hoare v. Stephens*, 32 Ch. D., 194; *Jenner-Fust v. Needham*, 32 Ch. D., 582 (C. A.)) If the mortgagee receives any rents after the day fixed for redemption, he will be entitled to retain them, and according to the English law, it seems that over-due rents in the hands of tenants will also belong to the mortgagee if they are not actually received by him till after the day appointed for redemption. (*Constable v. Howick*, 5 Jur. N. S., 331; *Jenner-Fust v. Needham*, 31 Ch. D., 500.)

It seems, having regard to the language of the second paragraph of sec. 87, that it is not absolutely necessary to ask for possession in an action of foreclosure. It would, however, be prudent for the mortgagee to join a claim for possession with a prayer for foreclosure. (a)

The section, however, does not apparently preclude an action of ejectment against a defendant who refuses to deliver up possession after a decree for foreclosure. In such cases, it seems, the mortgagee will have a fresh period under the Statute of Limitations, as he becomes the owner only when the order absolute for foreclosure is made. (*Heath v. Pugh*, 7 App. Cas., 235; *Harlock v. Ashberry*, 19 Ch. D., 539.)

Decree for sale.

88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as there-in mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Power to decree sale in foreclosure suit.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit,

(a) In England although a decree for foreclosure may provide for possession, it need not necessarily do so. (*Withall v. Nixon*, 28 Ch. D., 413; *Wood v. Wheeler*, 22 Ch. D., 281.)

including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale, and to secure the performance of the terms.

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The order for sale instead of foreclosure may be made at any time before foreclosure absolute. (*Union Bank v. Ingram*, 20 Ch. D., 463.) But no sale will be directed unless the Court can complete it by delivering possession and insuring that the title-deeds shall be handed over. (*Heath v. Crealock*, L. R., 10 Ch. App., 32.) The sub-section is modelled on 15 and 16 Vict., c. 86, sec. 48, now replaced by sec. 25 of the Conveyancing and Law of Property Act, 1881. The practice of the Court of Chancery under the former Act is thus stated in a well-known treatise on the subject:—“A sale was only directed where the Court was satisfied that it was for the benefit of the persons interested in the property. Thus, a sale would be directed where there was such a complication that the common decree could not be conveniently worked out; but not where it would be oppressive: as where it would deprive the mortgagor of an old family estate. Where it was for his benefit, the sale of the estate of an infant mortgagor might be directed. A sale might be directed, though the mortgagor, or some of the incumbrancers did not consent; but was refused where the plaintiff, who was a judgment-creditor, insisted on a foreclosure. Where the mortgaged property consisted of lease-holds, a sale was ordered at the instance of first mortgagor; the property being unproductive. A sale was directed at the instance of an equitable mortgagee by deposit of title-deeds where the deposit was accompanied by an agreement to execute a legal mortgage. The sale was usually directed to take place in the event of default being made in payment of what was found due by the Chief Clerk's certificate, within a limited time (usually six months), after the date of such certificate; but by consent, or where it was for the benefit of all parties, the sale would be directed to take place within a shorter period; or even immediately. If the sale was directed at the request of a subsequent mortgagee, or of the mortgagor, the Court could not, except by consent, dispense with a deposit, which must have been enough to cover the possible expense of a sale. Where the sale was directed at the request of a subsequent incumbrancer, or of the mortgagor, a reserved bidding was fixed of sufficient amount to cover what was due to the first mortgagee. Where a sale was directed in a suit in which a subsequent incumbrancer was plaintiff, the conduct of the sale was given to the first mortgagee.” (*Daniell's Chancery Practice*, pp. 1409-1411.)

89. If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property; and

Procedure
when
defendant
pays
amount
due.

Order ab-
solute for
sale.

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— the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished. (a)

The section is not very artistically drawn. It seems, however, that the right of redemption will subsist till the property is actually sold; the only right of the mortgagee being to have his debt and costs paid to him or to get the property sold. An assignee of the equity of redemption would also be entitled to protect his rights by paying the money into Court and to use, if necessary, the name of the mortgagor for that purpose. (*Behari v. Ganpat*, I. L. R., X All., 1.)

It is scarcely necessary to state that the validity of an order directing the sale of the mortgaged premises may not ordinarily be questioned on the ground that a transfer of the property is prohibited by statute. (*Madho v. Katwari*, I. L. R., X All., 130.)

It may be added that the dictum in *Hart v. Taraprosnonno* (I. L. R., XI Calc., 718), that when the mortgagee himself buys the property with the leave of the Court he is bound to prove that the property realised a fair amount, has been dissented from in subsequent cases. (Appeal from Order No. 155 of 1888; appeal from Order No. 367 of 1887.)

Recovery
of balance
due on
mortgage.

90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

The order is to be made in the same suit, and it is not necessary for the mortgagee to bring a fresh action for the money. Of course, no decree can be made under this section, where the mortgagor is under no personal liability to pay the mortgage-debt, or where the right to enforce such liability has been extinguished by the operation of the Statute of Limitations.

Redemption.

Who may
sue for re-
demption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge, upon the property;

(b) any person having any interest in, or charge upon, the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;

(a) *Quære*.—Does the mortgage-debt or costs carry any interest after the order absolute for sale?

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92.
—

(d) the guardian of the property of a minor mortgagor on behalf of such minor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

The persons entitled to redeem are thus classified in the English law—first, the mortgagor himself; second, the heir of the mortgagor; third, devisee; fourth, the assignee of the equity of redemption including subsequent mortgagees; fifth, the trustee of a bankrupt mortgagor; sixth, judgment-creditors who have acquired a charge on the land; seventh, the plaintiff in a creditor's suit after a decree for sale of the real estate; eighth, a tenant by elegit or statute and sequestrators; ninth, the Crown on forfeiture of the equity of redemption; tenth, the lord claiming by escheat; eleventh, persons claiming under voluntary conveyances; twelfth, persons claiming in default of appointment where the mortgage is made in exercise of a power; thirteenth, dowress, a tenant by courtesy and a jointress; fourteenth, a tenant for life or remainderman or reversioner; fifteenth, a committee of a lunatic who may redeem for the benefit of the heir.

It seems that a tenant may also redeem or procure somebody to redeem for him, but a mere contractee for the purchase of the equity of redemption having only an inchoate estate may not redeem until the completion of his purchase. (*Tasker v. Small*, 3. My. & Cr. 69.) A mere legatee or creditor is not entitled to redeem except in cases of collusion.

It is necessary to state that where the mortgaged property is settled, the tenant for life has the first option to redeem, and if the mortgagee purchases his interest, the remainderman cannot redeem without his consent. The equity of redemption, however, in any case, will be subject to the trusts of the settlement. (*Ariyaputri v. Alamelu*, I. L. R., XI Mad., 304; *Coote's Mortgage*, pp. 1163—1167.)

The equity of redemption may, of course, be extinguished by the act of the parties, and a conveyance or surrender of the equity of redemption by the mortgagor will not be set aside simply on the ground of a misconception on the part of the mortgagor of his rights under the law. (*Vishnu v. Kashi*, I. L. R., XI Bom., 174.)

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

Decree in
redemption-suit.

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

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—

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

Where there are several successive mortgages on the dismissal of the mortgagor's suit for redemption, the last incumbrancer takes the place of the mortgagor, the others becoming first and subsequent incumbrancers according to their priorities (3. Ha., 637). The decree provides for the successive redemption of the first mortgagee by the second, and in the event of the second redeeming the first for redemption by the third incumbrancer of the second on payment of the amount due to the second mortgagee, together with whatever he may have paid as the price of redemption and so on, till the last in the series of incumbrancers is reached, who must be redeemed by the mortgagor on pain of his equity of redemption being foreclosed.

The right of redemption is regulated by the respective priorities of the mortgagees where there are more than one, the second being entitled to redeem the first, the third the second, and so on. In an action by a second mortgagee to redeem the first mortgagee and to foreclose the mortgagor, the proper form of judgment is that in default of the plaintiff redeeming, the action is to stand dismissed with costs. (*Hallet v. Furze*, 31 Ch. D., 312.)

As a rule, a mortgagor will not be entitled to a decree for redemption if he does not pray for it, but, on the contrary, denies the validity of the mortgage; but where the issue is not merely mortgage or no mortgage, but whether the defendant has become the absolute owner of the property, the above rule will not be applied. (*National Bank v. United &c. Co.*, 4 App. Cas., 391.)

When the mortgage is redeemed, the mortgagee will be bound to deliver up all the title-deeds to the mortgagor including those that have been executed between the original mortgage and the final order for redemption. (*Coote's Mortgage*, 1097.) If the title-deeds cannot be produced, the mortgagee must not only pay the costs of the action, but also compensation for the damage done to the estate which may be set off against the mortgage-debt. He may also in addition be called upon to give the mortgagor a proper indemnity. (*Spence*, Vol. II, pp. 690, 691.)

It is hardly necessary to observe that a purchaser of the equity of redemption *pendente lite*, is not entitled to maintain a fresh suit for the purpose of redeeming the mortgagee. (*Ram v. Mahadaji*, I. L. R., 19 Bom., 141.)

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93. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

In default, foreclosure or sale.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time, postpone the day fixed under section ninety-two for payment to the defendant.

Power to enlarge time.

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Costs of mortgagee subsequent to decree.

The practice in England is to allow to the mortgagee all costs which are reasonably incurred by him in relation to the mortgage-debt. It is true that a mortgagee is a creditor and that he has also a security for the debt, but no distinction can be made between his position as a creditor and as a person holding a security. If, for instance, he

ACT IV OF 1882. incurs any costs in enforcing his claim against a surety who has only given a promissory-note, such costs will be chargeable against the mortgaged property. As pointed out by Lord Justice Fry, whether he is trying to get his money from the mortgagor or from a surety or out of the mortgaged property, he is trying to enforce his rights as mortgagee. (*National Provincial Bank v. Games*, 31 Ch. D., 582.) The law on the subject is thus laid down in Seton on Decrees: "Both in foreclosure and redemption actions, the mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage-money or otherwise relating to questions between him and the mortgagor and to add the amount to the sum due to him on his security." (4th Ed., p. 1059.)

Charge of one of several co-mortgagors who redeems.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

This section would seem to give the mortgagor who redeems only a charge on the share of each of his co-mortgagors, which must be realised by the sale of such share whatever may have been the form of the original mortgage. (See in addition to the cases cited, *ante*, pp. 344, 347, *Vithal v. Vishwas*, I. L. R., VIII Bom., 497; where the contest was between a purchaser under an execution of a portion of the mortgaged property, and an assignee of the mortgagor.)

The words "and obtains possession thereof" are not evidently intended to exclude the acquisition of a charge where possession is not obtained by the mortgagor who redeems.

The mortgagor who redeems is liable in his turn to be redeemed by his co-mortgagor. It seems that such a suit would fall within article 148 of the Second Schedule of the Limitation Act. (*Nura v. Jagat*, I. L. R., VIII All., 295. Distinguish *Umrunnissa v. Muhummad*, I. L. R., III All., 24.) Even if Article 148 were inapplicable to such suits, it is clear that the possession of the mortgagor who redeems the property would not be adverse to his fellow-mortgagors. (*Ram v. Sadasiv*, I. L. R., XI Bom., 422.)

Sale of Property subject to prior Mortgage.

Sale of property subject to prior mortgage.

96. If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

This is a step, if I may venture to say so, in the right direction. As pointed out by the Honorable Mr. Evans, in his speech on the motion for passing the Transfer of Property Act: "It is by no means unusual when the same property is pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave

the purchasers to fight out in Court the question of what they have bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrances on the property, endless confusion has been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things have been numerous and contradictory. The result is that the mortgaged property cannot fetch anything like its value. The debtor is ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered. It has been one of the objects of this chapter to remedy these and other similar evils.

"I hope some day, when our registration system is improved, to see a much greater change, and to see incumbered land sold under a statutory title, leaving all disputed questions to be fought out over the proceeds in Court. But pending this, it is very necessary to do something, and what is done by this chapter will, I expect, remedy, or at least ameliorate, many of the existing evil."

This section, it may be noticed in passing, indirectly recognises the right of a puisne mortgagee to sell the mortgaged premises subject to a prior incumbrance. (*Raghu v. Jurawan*, I. L. R., VIII All., 105, overruling *Sirbadh v. Raghu*, I. L. R., VII All., 568; *Janki v. Mau-tangui*, I. L. R., VII All., 577.)

97. Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the

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Applica-
tion of
proceeds.

Mortgage
not de-
scribed in
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—
clauses (b), (c), (d) & (e).

first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

The Otti and Kanam of Madras are well known instances of mortgages, the incidents of which are regulated by local usage. (See the provisions of Bombay Regulation V of 1827.)

Attachment of Mortgaged Property.

Attach-
ment of
mortgaged
property.

99. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

In reference to the provisions of this section the Law Commissioners observe:—"There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such and in execution selling the mortgagors' interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security of the existence of which they were wholly ignorant." (Report of the Indian Law Commissioners, 1879, p. 35.)

It may be noticed that this section does not prevent a mortgagee from suing on the covenant and levying execution on other properties belonging to the mortgagor. This is a very common practice and generally resorted to with a fraudulent object. (See pp. 171—175, *ante*.)

It seems that the principle of this section will not apply in the case of an assignee of a mere money-decree for interest due on a mortgage, the assignee not being entitled to any lien. (*Sami v. Krishna*, 1. L. R., X Mad., 169.)

The Act does not expressly deal with suits for unpaid interest, or for unpaid instalments where the mortgage-debt is payable by instalments. In a recent case in England, in an action by a vendor where the purchase-money was payable by instalments some of which had not fallen due, the plaintiff was declared entitled to a lien for the whole of the unpaid purchase-money with liberty to apply in respect of future instalments, as they should accrue due. (*Nives v. Nives*, 15 Ch. D., 649.)

In *Indurjeet v. Brij Bilas* (III Suth. W. R., 130), it is said that a mortgaged property burdened with the payment of an entire debt to two shareholders, is liable to sale at the instance of both creditors separately so long as their claims remain unsatisfied, and that the act of one of two holders of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt. The soundness of the proposition, however, is open to question.

In *Ratan v. Hanuman* (I. L. R., V. All., 118), it was held that the receipt by the mortgagee of the surplus proceeds, in part satisfaction of the mortgage-debt did not preclude him from following the mortgaged property in the hands of the purchaser.

Charges.

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100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses property incurred in the execution of his trust.

For cases under this section see *Madho v. Sidhbinai* (I. L. R., XIV Cal., 687); *Ramsidh v. Balgobind* (I. L. R., IX All., 158); cf. *Abudi v. Asa* (I. L. R., II All., 162.)

A charge must be distinguished from a mortgage as defined in the Act, more especially from a simple mortgage. In every mortgage, there must be a transfer of an interest in specific immoveable property, while in the case of a mere charge, no interest is transferred, nor is it necessary that the property to which it relates, should be specific. A charge differs from a mortgage not only in form but also in substance. A plea of purchase for value without notice, for instance, although it may be perfectly good against a charge, will be wholly unavailing against a mortgage.

A charge is generally created by a settlement or will, by which the property of the settlor or testator is either expressly or constructively made liable or especially appropriated to the discharge of a portion, legacy, or other burden or declared to be subject to a lien for securing them. The creation of a charge, and in this respect it is unlike a mortgage, does not imply a debt. It only confers a right of realization by judicial process. (Fisher's Mortgage, 84.)

It is necessary to state that a mere general covenant to charge land will not create a charge upon any specific immoveable property. If, however, there is a covenant to charge either the corpus or the income of property already in the possession of the covenantor, or even of after acquired property of a specified kind, there would be a valid charge. But a general indefinite covenant to settle lands will not be sufficient to create a charge. At any rate, it will not be enforced against a purchaser for value. (Lewin on Trusts, pp. 140—141.)

In the case of annuities, it is sometimes extremely difficult to say whether there is a charge on the estate itself or only on the rents and profits. No general or inflexible rule can be laid down, the question being one purely of intention to be ascertained from the language of the instrument.

Charges may be created not only by act of parties, but also by operation of law, an instance of which is to be found in the lien of the

ACT IV OF 1882. trustee for expenses properly incurred by him, and which is referred to in the last clause of the present section.

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Trustees, it is necessary to state, are favoured by the law, because, not only do they possess a lien upon the trust property, (a) but such lien is entitled to priority over incumbrances created by the *cestui que trust*. (*Exhall &c. Co. Re.*, 35 Beav., 449.) Trustees have also a right of retainer by virtue of their being entitled to be indemnified out of the trust estate. (For the general law on the subject, see Lewin on Trusts, pp. 184, 356, 638, 642, 903, 910.)

Extin-
guishment
of charges.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

This section is substantially in accordance with the English law on the subject as settled by recent authorities. (Lewin on Trusts, pp. 726—733. Jarman on Wills, Vol. II, pp. 692—693.) The question whether a charge has been extinguished or not principally arises in three classes of cases: first, where there are other incumbrances on the property for which priorities are claimed; secondly, where the estate which is subject to the charge is conveyed to a third person, and the question arises whether the conveyance carries with it the estate free of or subject to the mortgage; thirdly, where there is a contest between the real and personal representatives of the person by whom the charge has been paid off, or between the representatives of the tenant for life and the remainderman. I trust I shall not be accused of undue presumption if I venture to suggest that some degree of confusion has arisen by reason of the same tests being applied in all these cases for the purpose of ascertaining whether there has been a merger or not. But a test perfectly unobjectionable when applied to the second class of cases, becomes of questionable soundness when applied to the first or the third class. For instance, it is said the quantity of interest owned by the person paying off the charge ought to be the chief guide, in the absence of direct evidence, in determining whether merger takes place. If he be absolutely entitled, meaning entitled in fee simple, the presumption is that he meant to free the property from the charge; if only partially interested, the presumption is that he intended to keep it on foot (Lewin on Trusts, 730). Now, this rule, although fairly applicable in a contest between the real and personal representative, is not quite so pertinent when the question is whether a later incumbrancer is entitled to priority by reason of the merger of a prior charge; and in such cases it seems to me that it would save a great deal of litigation if the Court were to lay down a rigid rule to the effect that there should be no merger at all.

Then, again, the rule would seem to be equally inapplicable or useless where the question arises upon a conveyance or mortgage without any mention of the charge by the person who has paid it off. In such cases, the true rule seems to be that the charge cannot be set up as

(a) See the recent case of *Worcester &c. Co. v. Blick* (22 Ch. D., 255) where the right of subrogation is also discussed.

against the purchaser or mortgagee, and I do not know that it might not be safer to drop the expression merger altogether. (*Johnson v. Webster*, 4 DeG. M. & G., 488.)

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The principle formulated in the words in the present section "or such continuance would be for his benefit" would seem altogether to exclude the rule laid down in *Toulmin v. Steere*, the doctrine of which has been crusted over with so many exceptions that it is hardly recognisable in its present shape. The expression "absolutely entitled," however, does not necessarily imply the absence of an intervening charge or incumbrance, but has generally reference to the nature of the estate, being used for the purpose of designating what English lawyers call the fee-simple, as opposed to a limited estate.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter, does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Service or tender on or to agent.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

It is to be regretted that there is nothing in this Act corresponding to sec. 67, of the English Statute.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit

Notice, &c., to or by person incompetent to contract.

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made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Power to
make
rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.

For the rules made by the Calcutta High Court under this section applicable to the original side, see Macpherson's Mortgage, App. B.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

Lease defined.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Duration of certain leases in absence of written contract or local usage.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

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107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how
made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and
liabilities
of lessor
and lessee.

A.—Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substan-

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tially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

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(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Rights of
lessor's
transferee.

Provided that the transferee is not entitled to arrears of

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— rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee, and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Exclusion
of day on
which term
commen-
ces.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration
of lease for
a year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to
determine
lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Determi-
nation of
lease.

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby :

(b) where such time is limited conditionally on the happening of some event—by the happening of such event :

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

(f) by implied surrender :

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or

his transferee does some act showing his intention to determine the lease : ACT IV OF 1882.

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. SECTIONS 112—114. —

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

112. A forfeiture under section one hundred and eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting : Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section one hundred and eleven, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Waiver of notice to quit.

Illustrations.

(a.) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b.) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court Relief against forfeiture for non-payment of rent.

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SECTIONS 115—117. may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Effect of surrender and forfeiture on under-leases. 115. The surrender, express or implied, of a lease of immoveable property, does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease: but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section one hundred and fourteen.

Effect of holding over. 116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

Illustrations.

(a.) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b.) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Exemption of leases for agricultural purposes. 117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor General in Council, may, by notification published in the local official Gazette, declare all or any of such provisions to be so applicable, together with, or subject to those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

OF EXCHANGES.

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118—123.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

"Ex-
change."
defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of
party de-
prived of
thing re-
ceived in
exchange.

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and
liabilities
of parties.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange
of money.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift"
defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

Acceptance
when to be
made.

If the donee dies before acceptance, the gift is void.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

Transfer
how effect-
ed.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

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124—127.

Gift of ex-
isting and
future pro-
perty.

Gift to sev-
eral, of
whom one
does not
accept.

When gift
may be sus-
pended or
revoked.

124. A gift comprising both existing and future property is void as to the latter.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a.) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b.) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Onerous
gifts.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous
gift to dis-
qualified
person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a.) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy

calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b.) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

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1882.
SECTIONS
128—131.

Universal
donee.

Saving of
donations
mortis
causâ and
Muham-
madan law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. A claim which the civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

Illustration.

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

Notice to the debtor or the person in whom the property is vested operates as an equitable assignment. A chose in action does not admit of tangible actual possession, and the nearest approach to taking such

Actionable
claim.

Transfer of
debts.

ACT IV OF 1882. SECTION 131. possession lies in giving notice to the debtor or legal holder of the fund. The omission to give such notice is regarded as a species of neglect similar to that of which a person is guilty who leaves goods in the actual possession of a third party. (*Mutual &c. Society v. Langley*, 32 Ch. D., 471.) Where, therefore, there is a contest between *bonâ fide* incumbrancers, the one who is the first to give notice will be entitled to priority. The reason for the preference is that the assignment is perfected by notice. (See the law on the subject discussed in *Lewin on Trusts*, pp. 701-713. Cf. *Newman v. Newman*, 28 Ch. D., 674; *In re Holmes*, 29 Ch. D., 786; *Mutual &c. Society v. Langley*, 32 Ch. D., 460.)

But this rule holds good only where the equities of the parties are in other respects equal. (*Spencer v. Clarke*, 9 Ch. D., 137.) It seems that in the English law notice is immaterial where the assignees are mere volunteers, and an assignee for value will be entitled to preference even without notice over a voluntary assignee. Similarly, an execution-creditor will not be entitled to preference over a prior assignee as he can only take what the judgment-debtor could honestly give. (*Bradeley v. Consolidated Bank*, 34 Ch. D., 536, and cases cited therein.)

The case of a mortgage-debt charged on land is regarded in the English law as an exception to the rule by which priority is gained by notice. The reason which is given for the distinction is that the mortgagee has an interest either legal or equitable in the land. But the exception is strictly confined to a charge on real estate as such. (*Lee v. Howlett*, 2 K. & J., 531; *Re Hughes' Trust*, 2 H. & M., 89.)

It ought to be observed that, although the law does sometimes take notice of fractions of a day, as a rule, where notices are given on the same day, the elder is preferred to the younger security. (*Johnstone v. Cox*, 16 Ch. D., 571; S. C. on appeal, 19 Ch. D., 17; distinguish *Tomlinson v. Bullock*, 4 Q. B. D., 230.)

Although, generally speaking, the security is perfected by notice given to the trustees of the fund, yet such notice will not avail if the fund has been paid into Court and has ceased to be under the control of the trustees. (*Pinnock v. Bailey*, 23 Ch. D., 497.)

It is the duty of the transferee to give notice to the debtor, and by neglecting to give such notice he runs the risk of the debtor paying the debt to the original creditor, and it seems that the mere fact of the debtor not insisting upon the delivery of the deed by which the debt is secured would not make him liable to a double payment. In a recent case Vice-Chancellor Malins said:—"Every obligor or mortgagor, in my opinion, is guilty of a certain degree of negligence, when he pays off a mortgage or a bond debt, in not requiring the instrument creating the debt to be delivered up to him. But is he bound to do so? If there is negligence, where is the negligence? The greater negligence is that of the man who takes an assignment of a *chose in action*, as this is, without giving notice of it to the mortgagor. His duty, in order to protect himself, is to give notice to the mortgagor, and if he omits to do so, he exposes himself to the risk of the mortgagor paying the debt to the person originally entitled to receive it. I put this case, which may happen in the ordinary course of business, during the argument: a man borrows £10,000 on his own estate, and verbally arranges with the mortgagee that whenever he can pay him off £2,000, the mortgagee will take that on account; having received no notice that the mortgagee does not still remain the mortgagee,

that is, having no notice of an assignment, he writes to the mortgagee and sends him a cheque for £2,000. Is that a good payment or not? Why should it not be? I quite agree with what was read from the case of *Jones v. Gibbons* (9 Ves., 410), that it is not necessary to give notice of the assignment of a mortgage; but although it is not necessary to give notice of the assignment of a mortgage, you expose yourself, by taking a transfer and by not giving notice, to the risk that, after the assignment, the mortgagor may make the mortgage of no avail by paying off the mortgagee. That is a risk to which Mr. Banfather was exposed by not giving notice. Therefore, I believe, what is stated in the note to *Jones v. Gibbons* to be correct—that, although it is not necessary to give notice, any payment after assignment without notice to the mortgagor, is a good payment as against the transferee. Therefore, if a man takes an assignment and does not give notice and the whole of the debt is afterwards paid to the obligee or mortgagee, that is a good payment against a transferee, although I adhere to what I have said, that there is a degree of negligence attaching to the mortgagor in not having the mortgage-deed produced." (*In re Lord Southampton's Estate*, 16 Ch. D., 175.)

It is frequently said that if a person takes a transfer of a mortgage without enquiring from the mortgagor, he does so at his own risk as regards the state of the account. It is also said that the transferee takes subject to all existing equities. Now both the propositions are true only if confined to subsequent transactions, for it must not be understood that the mortgagor will be at liberty to dispute the truth of any statement made by him in the mortgage-deed as against an assignee for value without notice. In a recent case in England where, in addition to the statement in the mortgage-deed, there was a receipt endorsed upon the document for the full amount of the consideration-money; it was held that as against a transferee for value and who had no notice that the whole of the money had not been advanced, the account must be taken on the footing of its having been actually advanced. In giving judgment, the Court observed:—"It has been argued before us that there is a wide difference in this respect between a mortgage and an absolute conveyance, because it is said, and said truly, that, in the ordinary course of business, a prudent assignee of a mortgage, before paying his money, requires either the concurrence of the mortgagor in the assignment, or some information from him as to the state of accounts between mortgagor and mortgagee. The reason of this course of conduct is, however, in our opinion, to be found in the fact that an assignee of a mortgage is affected by all transactions which may have taken place between mortgagor and mortgagee subsequently to the mortgage, and the assignee is bound to give credit for all money received by his assignor before he has given notice of the assignment to the mortgagor. But, in the present case, the assignment was made very soon after the execution of the mortgage, and before the time for payment had arrived; so that, whilst it was possible, it was not probable, that any payment would have been made either of principal or interest; and we are of opinion that if an assignee is willing to take the risk of any payment having been made after the date of the mortgage, he is not guilty of carelessness or negligence if, in the absence of any circumstances to arouse suspicion, he relies upon the solemn assurance under the hand and seal of the mortgagor as to the real bargain carried into effect by

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131.

ACT IV of the mortgage-deed, upon the possession of that deed by the mortgagee and upon the receipt for the full amount of the mortgage money under the hand of the mortgagor." (*Bickerton v. Walker*, 31 Ch. D., 151. **SECTIONS** 132—135. But see *Chinnayya v. Chidambaram*, I. L. R., II Mad., 212, where the distinction between statements contained in the mortgage-deed and subsequent transactions between the parties does not seem to have been brought to the notice of the Court.)

In conclusion, it is necessary to state that notice is necessary only for the protection of the assignee. The first part of the section merely fixes the time when the transfer comes into operation, while the last clause provides for the protection of the debtor if he deals with the debt before that time. (*Jugdeo v. Brij Behari*, I. L. R., XII Cal., 505; *Kalka v. Chandan*, I. L. R., X All., 20.)

Notice to be in writing signed.

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Debtor to give effect to transfer.

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Warranty of solvency of debtor.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Discharge of person against whom claim is sold.

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

These provisions are partly borrowed from the Code Napoleon. As the law stood before the passing of the Act, it was only persons in a fiduciary position who could not make a profit by taking an assignment of a debt. (2 White and Tudor, L. C., 1195, 1197.)

136. No judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions. ACT IV OF 1882. SECTIONS 136—139.

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer. Incapacity of officers connected with Courts of Justice. Liability of transferee of debt.

Illustration.

A debenture is issued in fraud of a public company to A. A. sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

This section seems to formulate the law laid down in several English cases (see among others *Parker v. Clarke*, 30 Beav., 54; *Rolt v. White*, 31 Beav., 520.) But the authority of these cases seems to have been somewhat shaken by the recent case of *Bickerton v. Walker* (31 Ch. D., 151.)

The illustration to the section would seem to negative the distinction between a void and a voidable transaction, a distinction recognised by the English Courts in the case of a mortgage of real property. (2 White and Tudor, L. C., 1197.) I may, however, add that the applicability of the sections contained in this chapter to debts secured by a mortgage of immoveable property is open to some doubt.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and residue, if any, belongs to the transferor. Mortgaged debt.

139. Nothing in this chapter applies to negotiable instruments. Saving of negotiable instruments.

THE SCHEDULE.

(a.) STATUTES.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10	Uses	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances	The whole.
4 Wm. & Mary, c. 16.	Clandestine mortgages ...	The whole.

ACT IV OF
1882.

(b.) ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IX of 1842 ...	Lease and release ...	The whole.
XXXI of 1854...	Modes of conveying land	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and,"
XXVII of 1866	Indian Trustee Act ...	Section 31.
IV of 1872 ...	Panjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ...	In sections 35 and 36, the words "in writing."

(c.) REGULATIONS.

Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts: Interest: Mortgagees in possession.	Section 13.

APPENDIX I.

LOCAL MORTGAGES.

IN Madras, in addition to the forms of mortgage to be found in other parts of the country, we meet with two descriptions of mortgage possessing well-known incidents derived from custom and ancient usage. They are known as Otti and Kanam, both of them being in the nature of usufructuary mortgages, and partaking to a certain extent of the character of leases. The mortgagor, who is known as the Jenmi, makes a lease in favour of the mortgagee, who is known as the Otti or the Kanam holder, at a fixed rent out of which the mortgagee is entitled to retain the interest due on the mortgage-debt, the balance only being payable to the mortgagor. By local custom such mortgages are not redeemable before the lapse of twelve years from the date of their execution. (*Eduthil v. Kopashon*, I Mad. H. C. Rep., 122; *Keshava v. Keshava*, I. L. R., II Mad., 45; *Kumini v. Parkam*, I Mad. H. C. Rep., 261; *Pramatan v. Madatil*, I Mad. H. C. Rep., 296). An Otti, however, differs from a Kanam in two respects. In an Otti the Jenmi is only entitled to a mere peppercorn rent, as the mortgagor is ordinarily taken to have received two-thirds of the value of his land, so that the interest practically absorbs the rent reserved on the transaction. In a Kanam, however, there may be a substantial difference between the rent reserved and the interest payable on the mortgage. An Otti holder is also entitled to claim, but not a Kanamdar, a right of pre-emption, in case the Jenmi is desirous of selling the property. (*Kumini v. Parkam*, I Mad. H. C. Rep., 261.) This right of pre-emption involves the right to make further advances. If therefore the mortgagor should wish to borrow further sums of money on the security of the land, he ought to give notice to the Ottidar who has the option of making further advances. But no such privilege can be claimed by a Kanamdar. (*Kunhamu v. Keshavan*, I. L. R., III Mad., 246.)

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The reason for the distinction as pointed out in *Marakar v. Munhoruli* (I. L. R., VI Mad., 140), (a), is perfectly intelligible. The Ottidar practically advances to the full value of the property, and his position differs but very little from that of an absolute purchaser. Having invested so much in the property, it is but natural that the Ottidar should secure his holding from disturbance by an understanding with the Jenmi that he should have the option of making further advances; and the customary rule which now prevails seems to have grown out of it.

I ought to add that although the right to hold for twelve years is one of the customary incidents of Ottis as well Kanams, such right may be excluded by agreement between the parties. (*Shekhara v. Raru*, I. L. R., II Mad., 193; *Ahmed v. Kunhamed*, I. L. R., X Mad., 192. Distinguish *Kanara v. Govindan*, I. L. R., V Mad., 310.)

Then again not only may the right of the Kanamdar or Otti holder to hold for twelve years certain, be curtailed by an agreement to that effect, but his right to hold the land as a security at all will depend on his acting conformably to usage and the Jenmi's interest. If therefore the mortgagee repudiates the Jenmi's title, he will forfeit his right to hold for the customary period. (*Ramen v. Kandapuni*, I Mad. H. C. Rep., 445; *Mayavanjari v. Nimini*, II Mad. H. C. Rep., 109; *Kellu v. Puapalli*, II Mad. H. C. Rep., 161.) And it seems to make no difference that the title is repudiated for the first time in the answer of the mortgagee. (*Mayavanjari v. Nimini*, II Mad. H. C. Rep., 109. But see *Paidal v. Parakal*, I Mad. H. C. Rep., 13.)

But the right of an Ottidar is not forfeited simply by his setting up further charges which he fails to prove or by his denying the validity of an assignment of the Jenmi's title in favor of a third party. (*Kannoth v. Vannathan*, I. L. R., III Mad., 74.)

The forfeiture of the mortgagee's right is said to be deducible from local custom and usage. I speak with diffidence, but the assumption is not perhaps wholly untenable that the rule of law formulated in some of these cases owes its origin to mistaking the Otti or Kanam holder for a mere lessee and applying to such cases the English law of forfeiture where a tenant disclaims the title of his landlord, a legacy of the old feudal days when the vassal

(a) This overrules *Paidal v. Parakal* (I Mad. H. C. Rep., 13.)

holding land had to swear fealty to his lord, and when a breach of his oath was followed by a forfeiture of the fee.

I ought here to state that a Kanam may not always be clearly distinguishable from a lease proper. The general rule is that if the transaction is entered into as a security for the repayment of money, it will be regarded as a mortgage with all the incidents belonging to it either under the law or under local usage. If the case is otherwise, the transaction will be regarded only as a lease. (*Nellaya v. Vadakipat*, I. L. R., III Mad., 382.)

It is hardly necessary to state that when the mortgagor is unable to give possession, the amount advanced by the Kanamdar may be immediately recovered from him. (*Vayalil v. Udaya*, II Mad. H. C. Rep., 315.)

To return to the question of forfeiture, the mortgagee does not forfeit his right to hold for twelve years by merely allowing the rent to fall into arrears. (*Rautan v. Kadangot*, I Mad. H. C. Rep., 112; *Kunju v. Manavikrama*; *Krishna v. Shankara*, I Mad. H. C. Rep., 113 note.)

If the rent remains unpaid, the Jenmi may either sue for it or take credit for the amount in arrears when he pays off the mortgage. (*Unnian v. Rama*, I. L. R., VIII Mad., 415, and cases cited therein). The right to claim such credit being one of the incidents of the transaction, a pledge of his rights to a third party by the Kanam holder cannot affect the right of the Jenmi to set off the arrears due to him, against the sum due to the Kanam holder from the Jenmi. (*Achuta v. Kali*, I. L. R., VII Mad., 545.)

Another noticeable peculiarity of these mortgages, is that on redemption the Jenmi pays not only the amount advanced to him, but also the value of improvements made by the mortgagee. (*Kanna v. Kombi*, I. L. R., VIII Mad., 381.) In some districts, however, as Ernad, the Jenmi on redemption is entitled to take credit for one-half of the value of improvements effected by the Kanamdar. (*Unnian v. Rama*, I. L. R., VIII Mad., 415.) Under the head of improvements, however, the Kanamdar is not entitled to claim the value of trees of spontaneous growth. (*Narayana v. Narayana*, I. L. R., VIII Mad., 284.) It may be noticed that in the last case the Court, departing to a certain extent from the well-known rule on the subject, said that the costs of taking an account of the improvements should fall on the party who refuses to accept a reasonable offer. In connection with the question of im-

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provements, I may mention that it has been judicially decided that there is no usage in Malabar, nor any presumption, that a tenant is not entitled to compensation if his right to it is not specially reserved by the Kanam deed. (*Mupana v. Virupa*, I. L. R., IV Mad., 287.)

It appears that there is a mortgage called Peruartham in certain parts of Malabar, in which the mortgagee can redeem only on payment of the market value of the land at the time of redemption, whatever may have been the amount for which the security was originally given. (*Shekari v. Mangalam*, I. L. R., I Mad., 57.)

I will conclude with a few remarks on the right of pre-emption of an Ottidar, and as growing out of it, the right to make further advances in preference to strangers. The right of pre-emption claimable by the Ottidar cannot be defeated by public notice of and the option of bidding at an execution sale. The Ottidar should not be driven to give a fancy price at an auction. His position entitles him to be fully informed of the price he has to pay before he can be called upon to buy. (*Ramapurath v. Ramapurath*, I. L. R., V Mad., 198. But see *Vasudevan v. Keshavan*, I. L. R., VII Mad., 309.) But the last mentioned case may perhaps be distinguished upon the ground that an offer was made to the Ottidar's Karnavan to purchase at the price offered by the highest bidder, as well as on the ground that the claim was confined merely to setting aside the auction sale.

The right of the Ottidar to make further advances will preclude a person claiming under a deed of further charge from enforcing his security, if no option was given to the Ottidar to make the further advance. (*Ambu v. Raman*, I. L. R., IX Mad., 371.) I ought to mention that this right of the Ottidar continues as well before as after the lapse of the customary period. (*Ali v. Nillakanden*, I Mad. H. C. Rep., 356.)

Very closely allied to the Kanam and Otti are the mortgages known from ancient times in Malabar as Otti Kamparam and Nirmutal. The distinction between these different forms of mortgage is thus stated in *Kundu v. Impichi* (I. L. R., VII Mad., 442):—

“The distinction between Kanam and Otti consists in this, that in the latter the mortgagor is ordinarily taken to have received two-thirds of the value of his land and the interest due on the debt is considered to be equal to the annual

rent. Otti Kamparam is a higher stage of the mortgage. The mortgagor is taken to have borrowed 10 per cent. or more of the amount of the Otti. Under this tenure, the mortgagor must also repay the further advance with interest at 10 per cent. when he pays up the Otti. The next stage of the mortgage is Nirmutal. This transaction is entered into when a still further sum is lent after the execution of Otti Kamparam. By this transaction the mortgagor gives up all but the right of water.”

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In addition to the above kinds of mortgage there is another known as Kividu Otti, the precise character as well as the incidents of which are somewhat obscure. The better opinion, however, seems to be that Kividu Otti is not an absolute transfer, but a transaction in the nature of a mortgage and therefore liable to be redeemed. The interest, however, or to use the language of Scotch law, the radical right left in the Jenmi after he has parted with the land under a Kividu Otti is of the most shadowy character. I may observe that the different forms of mortgage in Malabar while illustrating the infinite divisibility of ownership also point an important moral. They show the tenacity with which the people of this country cling to their lands and the reluctance with which they part with the last vestiges of ownership in their fields and houses.

I have not been able to find in the reports of the Bombay Court local mortgages of the description prevailing in parts of the Madras Presidency. The most common form of pledge in Bombay is known as the *gahanlahan*, in which the land is mortgaged with a condition that if the money is not paid by the time named in the deed, the mortgage shall be *lahan*, a word said to be of very doubtful etymology and employed only as an alliteration after the word *gahan* which means mortgage. The meaning of the phrase *gahanlahan* as given in Molesworth is “closing a pledge concern wherein the money loan with its accrued interest exceeds the value of the pledge, by relinquishing a pledge.”

It is worthy of notice that in the Bombay Presidency hypothecations are not generally recognised as against third parties. They are, however, well-known in Guzerat under the name of *san*, and are allowed there. In the Deccan, however, it is necessary that the mortgage should be accompanied by possession to give it validity against purchasers for value without notice. (*Gopal v. Krishnappa*

APP. I. VII Bom. H. C. Rep., 60). Similarly in Konkan a mortgagee without possession is invalid as against a subsequent mortgagor with possession and without notice of the prior mortgage. (*Hari v. Mahadaji*, VIII Bom. H. C. Rep., A. C. J., 50).

It seems, however, that these distinctions are not of much practical importance, as according to the Bombay High Court registration is a substitute for possession. (See *ante*, p. 32.)

APPENDIX II.

STATUTES.

LIMITATION ACT.

THE only articles relating to mortgages or charges are the following :—132, 135, 145, 146, 147, and 148.

The period of limitation may be enlarged either by an acknowledgment of liability, or by payment of interest, or part payment of principal by the defendant. But no such acknowledgment or payment by one or more of several mortgagees or mortgagors, as the case may be, will render the others chargeable.

An acknowledgment to be within the meaning of the Act must be an acknowledgment of an existing liability. (*Ram Das v. Brijnundun*, I. L. R., IX Cal., 616; *Dharma v. Govind*, I. L. R., VIII Bom., 99; *Tomson v. Bowyer*, 9 Jur. N. S., 863; *Hardy v. Reeves*, 4 Ves., 466; *Ambula v. Naduvakat*, I. L. R., VI Mad., 325.)

There are conflicting decisions on the question, whether an acknowledgment in order to be good, must be good under the Act in force when the suit is brought or that in force when the acknowledgment was made. (*Daia v. Sarfraz*, I. L. R., I All., 425; *Mukhanni v. Manan*, I. L. R., V Mad., 182; *Kammana v. Chembrakandy*, VI Mad. H. C. Rep., 138; *Kidar v. Ulfat*, III Weekly Notes, 202; *Manir-uddin v. Muhammad*, V Weekly Notes, 194; *Chujoo v. Syud Nasir*, II Agra H. C. Rep., 227; *Bisheshar v. Bhagi Rattu*, V Weekly Notes, 211; cf. *Batchelor v. Middleton*, 6 Hare., 75; *Stansfield v. Hobson*, 3 De G. M. & G., 620; 16 Beav., 236.)

Part payment will also, as already pointed out, have the effect of extending the period of limitation; and this although made before the Act giving such effect to part payments came into force. (*Teagaraya v. Mariappa*, I. L. R., I Mad., 264.) In England payment of rent by a tenant to the mortgagee will not save limitation. (*Harlock v. Ashberry*, 19 Ch. D., 539.) The last clause of section 20 of the Indian Act would also seem to point to actual occupation. (See Lord St. Leonard's Real Prop. Stat., 47; and *Grant v. Ellis*, 9 M. & W., 128.) Questions of considerable nicety occasionally arise as to the authority of an agent to make a payment. In a recent English case where the solicitor of the mortgagor continued to pay the interest professedly for the mortgagor, but there was no evidence of any payment whatever having been made by the mortgagor to the solicitor, the Court held that the payments made by the solicitor could not keep alive the right of the mortgagee. (*Newbould v. Smith*, 29 Ch. D., 882; 33 Ch. D., 127.) But the facts of the case were somewhat peculiar, and

APP. II. the judgment of the Court must be taken in connection with the facts. Indeed the question is not strictly one of law but of fact. For it cannot certainly be the law that every mortgagee who receives his interest through some one else is bound before the Statute runs out to apply to the mortgagor in person. (*Adnam v. Earl of Sandwich*, 2 Q. B. D., 485.)

An acknowledgment by one of several mortgagees does not affect the proportionate interest of the others. Therefore, where the mortgagees are joint, the acknowledgment it seems must be by all of them. The Punjab Chief Court has refused to give any effect at all to an acknowledgment by one of two joint mortgagees on the ground, that there is no provision in the Indian Act, similar to section 28 of 3 and 4 Will. IV., c. 27, giving such acknowledgment the effect of splitting up the joint mortgage. (*Mah Bibi v. Motan*, Punj. Rec., No. 61 of 1877; *Devi Dyal v. Prob Dyal*, *ib.*, No. 85 of 1880.) It would, however, appear from the speech of the legal member, although we are not permitted to refer to it, that the Legislature did not intend to depart from the provisions of the English Statute on this point. But, however that may be, an acknowledgment by one of several mortgagees, who have no apportionable interest in the money secured by the mortgage, would be absolutely ineffectual. (*Richardson v. Younge*, L. R., 10 Eq., 275; 6 L. R., Ch. App., 478.) A sub-mortgagee is not a person claiming under the mortgagee within the meaning of section 19. (*Lala Mal v. Gulam*, Punj. Rec., No. 32 of 1880; followed in *Gugan v. Jwana*, Civil Appeal, No. 1541 of 1883.) It is doubtful whether sealing may not under certain circumstances amount to signing. Anything, however, which is intended by the writer to be equivalent to a signature, would seem to be sufficient, such as stamping or printing one's name or putting down one's initials. The mark made by a marksman may also be a sufficient signature. (*Bheeman v. Eeranah*, VII Mad. H. C. Rep., 358; *Bengal I. Co. v. Koylas*, X Suth. W. R., 293.) The omission of illustration 1 of section 20 of the Act IX of 1871, from the present Act is significant. (See *Luckmun v. Rumzan*, VIII Suth. W. R., 513, compare *Mohamed v. Dilwar*, 2 Shome., 135.)

As regards redemption, it has been held in *Chathu v. Aku* (I. L. R., VII Mad., 26), that where the mortgagee was in actual possession, the mere receipt of rent by one of the mortgagors for twelve years, although evidence that he had claimed an exclusive right to redeem, did not bar the claim of the other mortgagors to redeem from the mortgagee in actual possession as against whom they would have 60 years. If a mortgagee has been in possession of a part of the mortgaged premises for the full period of limitation that part cannot be redeemed. (*Kinsman v. Rouse*, 17 Ch. D., 104.) It has been held in some cases that Art. 148 would apply to a claim as against one of several mortgagors by his fellow mortgagors to redeem the mortgaged property where such property had been redeemed by the former from the mortgagee and the period would apparently run from the date on which the co-mortgagors became entitled to claim redemption. At any rate, the possession of the redeeming mortgagor cannot be regarded as adverse to his co-mortgagors, and the latter will have at least 12 years to recover their shares under Art. 144 (see *Umr-un-nissa v. Muhammad*, I. L. R., III All., 24; *Chathu v. Aku*, I. L. R., VII Mad., 26.) I will conclude by referring to one or two English cases on points which have not been decided in any reported Indian case or on which our Law is silent. It has

been held that a remainderman, although suing within 20 years **APP. II.** from the death of the tenant for life will not be entitled to redeem. (*Cholmondeley v. Clinton*, 4 Bligh., 1.) But where the mortgagee acquires the interest of a tenant for life, whether before or after taking possession, limitation would run only from the determination of such estate. (*Hyde v. Dallaway*, 2 Hare, 528; see also *Rafferty v. King*, 1 Keen, 601; *Price v. Copner*, 1 S. & S., 347.) Similarly where the same person who is entitled to the rents is also liable to pay the interest, there can be no limitation. (*Tophan v. Boothe*, 35 Ch. D., 607.) The coalition of the interests of mortgagor and mortgagee would exclude the operation of the Statute. (*Rafferty v. King*, 1 Ke., 601; *Tull v. Owen*, 4 Y. & C., 201; *Hyde v. Dallaway*, 2 Ha., 528; *Wynne v. Styau*, 2 Ph., 303; *Browne v. Bishop of Cork*, 1 D. & Wal., 714; *Spickernell v. Hotham*, Kay, 669.) It is unnecessary to point out that if the equity of redemption is barred no trust will attach to the surplus proceeds upon a sale by the mortgagee. (Dart, p. 452.) In the recent case of *Hugill v. Wilkinson* (38. Ch. D., 480), it was held, that although there is nothing to prevent a mortgagee of a reversionary interest from taking proceedings against his mortgagor, while it is still an interest in reversion, the right to bring an action for the recovery of the land continues until the expiration of 12 years, from the time at which there has been a right to bring an action to recover the land in possession.

As the mortgagee becomes the owner only when he obtains the order absolute for foreclosure, he may bring an action to recover possession of the land within the usual period of limitation from the date of such order. (*Pugh v. Heath*, 7 App. Cas., 235; see, also, *Harlock v. Ashberry*, 19 Ch. D., 539.)

It may be added that according to the decisions of the Calcutta High Court, Art. 147 of the Limitation Act applies only to that class of mortgages in which the remedy is either foreclosure or sale in the alternative. It does not therefore apply to the well-known class known as Bye-bil-Wufa or Kutkobalas. (*Girwar v. Thakur*, I. L. R., XIV Calc., 730. S. A. No. 921 of 1888.)

STAMP ACT.

The provisions relating to mortgages are contained in sec. 3, cl. 13, sec. 24, and art. 44 of Sch. I.

As to the distinction between a mortgage and an agreement, see *Anonymous case* (I. L. R., VII Mad., 209); *Anonymous case* (I. L. R., VIII Mad., 104). As to the distinction between a mortgage, and a lease see *Anonymous case* (I. L. R., VII Mad., 203); *Ex parte Hill*, (I. L. R., VIII Calc., 254). As to the distinction between the two classes of mortgages named in article 44, see *Anonymous case* (I. L. R., X Calc., 274); *Hinganghat, &c. Co. v. Rekchand* (I. L. R., VIII Bom., 310). Stipulations which do not create fresh obligations do not require any additional stamp duty. (*Damodar v. Vamanrav*, I. L. R., IX Bom., 435). As to the stamp duty payable on a sale of the equity of redemption under an execution, see *Anonymous case* (I. L. R., VII Mad., 421). (Cf. *Anonymous case*, I. L. R., V Mad. 18; *Anonymous case*, I. L. R., X Calc., 92; but see *In re Ramkrishna*, I. L. R., IX Bom., 47; *Sha Ngindas v. Halaikore*, I. L. R., V Bom., 470). As to the

APP. II. mode in which the stamp duty ought to be calculated where the equity of redemption is sold in different parcels to different purchasers, see *In re Vishnu* I. L. R., X Bom., 58; compare *In re Ramkrishna* I. L. R., IX Bom., 47.)

COURT FEES' ACT.

The only clause expressly relating to mortgages is clause IX, sec. VII, a clause which has been found rather difficult to apply in practice. The following are some of the more important cases which have been decided under the Act. For the sake of convenience cases relating to the jurisdiction of the various Civil Courts in this country are also given although the principle on which these cases are based, the competency of the Courts being regulated by the value of the subject-matter of the suit is different from the hard-and-fast rule laid down in the Court Fees' Act for the purpose of determining the proper fee chargeable on a plaint or memorandum of appeal.

In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of the properties sued for, "the principal money" expressed to be secured must be taken to be the proportionate amount of the debt for which such portion of the property is liable. (*Balkrishna v. Nagvekar*, I. L. R., VI Bom., 324.)

A decree having been given by the lower Courts in a redemption suit, directing that the mortgaged property should be redeemable on payment of the amount expressed to be secured by the mortgage-deed, viz., Rs. 1,152-15-4, to the defendants,—viz., Rs. 568-9-8 to the defendant Umarchan, and Rs. 584-5-8 to the defendant Moro and two others,—appeals were preferred to the High Court by Umarchan and Moro, each of them presenting a separate memorandum of appeal. A question arose as to what Court Fees should be levied on them. On reference by the Taxing Officer of the Court,—*Held*, that the Court Fees to be computed upon each memorandum of appeal was, under section 7, clause 9 of the Court Fees' Act, VII of 1870, to be according to the principal money expressed to be secured by the deed of mortgage, viz., Rs. 1,152-15-4. (*Umarchan v. Mahomed*, I. L. R., X Bom., 41.)

For the purpose of determining the probate fee in respect of an annuity, the word "value" in the Court Fees' Act, VII of 1870, Schedule I, clause 11, must be taken to mean the market value of the annuity, and not ten times the amount of a yearly payment. Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance. (*In re Will of Ram Chandra*, I. L. R., I Bom., 118.)

For the purposes of jurisdiction (Madras Civil Court Act, 1873), the subject-matter of a suit to establish the validity of a charge upon property is, when the property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property. (*Krishnama, v. Srinivasa*, I. L. R., IV Mad., 339.)

Where a suit for possession is brought after a decree for foreclosure has been obtained, the valuation of such a suit, in so far as the jurisdiction of the Court is concerned, is not to be calculated according to

the scale laid down in the Court Fees' Act, section 7, clause 9. APP. II. (*Ahollya v. Shama*, I Calc. L. Rep., 473.)

The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a *pro formâ* defendant. *Held*, that the value of the subject-matter of the suit was not the market value of the land, but the amount of the mortgage money. (*Kubair Sing v. Atma Ram*, I. L. R., V All., 332)

Where an instrument of mortgage does not expressly secure the amount to be allowed for improvements on redemption of the mortgage, the value of the improvements is not to be calculated in ascertaining the "value of the subject-matter of the suit," for the purpose of jurisdiction under section 12 of the Madras Civil Court's Act (*Per Curiam*, Turner, C. J., and Muttusami Ayyar, J., dissenting.)

By the custom of Malabar a condition is attached to all Kanam demises that the mortgagor shall pay the value of improvements made by the mortgagee during the term of the demise before he can redeem, and the repayment of the sums spent in improvements is thus secured by the mortgage in the same manner as the repayment of the principal advanced, and must be calculated in determining the value of the subject-matter of the suit for the purpose of jurisdiction. (*Per* Turner, C. J., Muttusami Ayyar, J., concurring.) (*Zamrin of Calicut v. Narayana*, I. L. R., V Mad., 284.) *Anonymous case* (I. L. R., V Mad., 287, note).

The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right, *quâ* such share, was under Rs. 1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding Rs. 1,000 was due, had been tacked to the mortgage, and that until such sum had been satisfied, the plaintiff could not recover possession of his share. *Held*, on the question whether the Munsif had jurisdiction, that the value of the subject-matter of the suit was the value of the mortgagee's right, *quâ* the plaintiff's share; and as the value of such right did not exceed Rs. 1,000 even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognisable in the Munsif's Court. The principle laid down in *Gobind Singh v. Kallu* (I. L. R., II All., 778,) followed. (*Bahadur v. Nowabjan*, I. L. R., III All., 822.)

A deed of mortgage was executed by P., T., and S. for Rs. 4,000. A., the purchaser of the share of S., brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of P., and T., the other mortgagors. *Held*, by the Full Bench with reference to section 7, article IX of the Court Fees' Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto*, extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount,—namely, Rs. 1,333-5-4,—more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject.

APP. II. (*Balkrishna v. Nagvekar*, I. L. R., VI Bom., 324, referred to.) *Held*, also, with reference to the terms of section 20 of the Bengal Civil Court's Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. *Per* Mahmood, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject in question of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court. Observations by Mahmood, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction. (*Amanat v. Bhajan*, I. L. R., VIII All., 438.)

The stamp duty payable under Sch. B. of Act X of 1862, on a suit to redeem mortgaged land paying revenue to Government, should be calculated on the sum for which the land is mortgaged, and not on the market value of such land. (*Nandram v. Balaji*, V Bom. H. C. Rep., A. C. J., 153.)

A suit brought by a kanam-holder against the jenmi and the holders of a prior kanam in possession, to recover possession of the lands, may be properly treated, for the purpose of jurisdiction, as a suit for land, although it results in a decree for redemption, and if regarded as a redemption suit, would be cognisable by a Court of subordinate jurisdiction. (*Marakar v. Parameswaran*, I. L. R., VI Mad., 140.)

REGISTRATION ACT.

THE most important sections bearing on mortgages, are secs. 17 and 50.

The necessity for the registration of a deed of mortgage is determined by the amount of the principal money secured by it. (*Nana v. Anant*, I. L. R., II Bom., 353; *Narasayya v. Guruvappa*, I. L. R., I Mad., 378; *Sadagopayyan v. Dorasami*, I. L. R., V Mad., 214.) In *Kattamuri v. Padalu* (I. L. R., V Mad., 119), however, it was held that the proper test for the purpose of registration is not merely the principal secured by the bond but the amount of the least sum recoverable under it. This was also the view which was formerly taken by the Allahabad High Court (*Himmat Singh v. Sewa Ram*, I. L. R., III All., 157, and cases cited therein. (See also *Nubira v. Achampat*, I. L. R., III All., 422.) These cases, however, have since been overruled. (*Habibullah v. Nakhed*, I. L. R., V All., 447.) In the Calcutta High Court the rule that for the purpose of registration the principal alone must be taken into account has been uniformly acted upon. (*Panchi v. Ahmedulla*, XII Calc. L. Rep., 444; *Korban v. Pitumbari*, XIII Calc. L. Rep., 256, S. C., I. L. R., X Calc., 82). As regards usufructuary mortgages, see *Ram Doolary v. Thacoar* (I. L. R., IV Calc., 61).

The necessity of registering an assignment of a mortgage depends not upon the amount of the mortgage, but upon the amount paid by the assignee. (*Satra Kumaji v. Visram*, I. L. R., II Bom., 97; *Ganpat v. Adarji*, I. L. R., III Bom., 312.) The assignment of a mortgage decree if the amount paid for it is one hundred rupees or upwards is compulsorily registrable. (*Gopal v. Trimbak*, I. L. R., I Bom., 267.)

The question whether a receipt for sums paid in satisfaction of a mortgage-debt is or is not a document within the meaning of section 17, has been fruitful of conflicting decisions. (*Imdad v. Tasadduk*, I. L. R., VI All., 335; *Dalip v. Durga*, I. L. R., I All., 442; *Shidlingapa v. Chenbasapa*, I. L. R., IV Bom., 235; *Annapa v. Ganpati*, I. L. R., V Bom., 181; *Gugunfur v. Muhomed*, XX Suth. W. R., 334; *Venkayyar v. Venkata*, I. L. R., III Mad., 53; *Venkatarama v. Chinathambu*, VII Mad. H. C. Rep., I; *Soorjo v. Bhugwan*, XXIV Suth. W. R., 328.) It is, however, reasonably clear that the term consideration implies that the person himself to whom the money is paid by some act of his limits or extinguishes his interest in consideration of the payment, and the term would be altogether inapplicable to a case where the limitation or extinction, if any, is merely the legal consequence of such payment. The weight of authority also is decidedly in support of this view, the only cases in which a contrary view has been taken being, *Dalip v. Durga* (I. L. R., I All., 442); *Soorjo v. Bhugwan* (XXI Suth. W. R., 328), and *Imdad v. Tasadduk* (I. L. R., VI All., 335).

But a document, although it may be called a receipt, must be registered, if it is intended to be used for the purpose of proving the release of a claim secured by mortgage. (*Safdar Ali v. Lachman*, I. L. R., II All., 554; *Mahadaji v. Vyankaji*, I. L. R., I Bom., 197; *Ramapa v. Umanna*, I. L. R., VII Bom., 123; *Basawa v. Kalkapa*, I. L. R., II Bom., 489. But see *Lalun Monee v. Sona Monee*, XX Suth. W. R., 334.)

In the case of zuripeshgi leases granted for one year certain, but as usual containing a stipulation that in the event of the loan not being repaid, the lease shall continue in force, registration is compulsory. (*Bhobani v. Shidnath*, I. L. R., XIII Cal., 113.)

On the question of priority among rival deeds, it is necessary to notice that it only applies where the deeds are antagonistic. Thus, if a person mortgages his property and afterwards assigns the mere equity of redemption no question of priority can arise. (*Ramchandra v. Krishna*, I. L. R., IX Mad., 495.) On the principle that an execution-sale passes only what the debtor could honestly convey, a purchaser under an execution cannot claim priority merely by virtue of the registration of his sale certificate (*Sobhagchand v. Bhaichand*, I. L. R., VI Bom., 193; *Bapuji v. Sattyabhamabai*, I. L. R., VI Bom., 490; *Ramaraja v. Arunachala*, I. L. R., VII Mad., 248.)

It ought to be added that, although as a general rule, priority is determined where both the rival deeds are registered by the date of execution, and not the date of registration, in Bombay, owing to the adoption of the rule of Hindu Law as to the necessity of delivery of possession qualified by the principle that registration being notice is a substitute for possession, the rights of a subsequent alienee who obtains possession can only be defeated by the registration of the first document prior to the execution of the second deed. (*Lalubhai v. Bai Amrit*, I. L. R., II Bom., 299; cf. *Tukaram v. Ramchandra*, I. L. R., I Bom., 314; *Shringarpure v. Pethe*, I. L. R., II Bom., 662; *Hasha v. Ragho*, I. L. R., VI Bom., 165; *Lakshmandas v. Dasvat*, I. L. R., VI Bom., 168; *Sobhagchand v. Bhaichand*, I. L. R., VI Bom., 193; *Bapuji v. Sattyabhamabai*, I. L. R., VI Bom., 490; *Vasudev v. Narayan*, I. L. R., VII Bom., 131.)

Although in the Calcutta High Court possession is not essential to

APP. II. — complete the title of a purchaser for value, it is still a very important element in questions of notice. (*Narain v. Dataram*, I. L. R., VIII Calc., 597; S. C., Calc. Rep., 241.) It seems, however, that constructive possession, that is, possession by receipt of rents, is not such notice as would postpone a registered document. (*Goonomoney v. Basanta Kumaree*, S. A. No. 442 of 1888, Calcutta, unreported; citing *Barnhart v. Greenshields*, 9 Moo. P. C., 18.)

Another question which has given rise to conflicting decisions is the true construction of section 50 of the present Registration Act, as regards its operation upon documents executed while the prior Registration Acts were in force. The weight of authority, however, is against any retrospective effect being given to the section. (*Sri Ram v. Bhagirath*, I. L. R., IV All., 227; *Rupchand v. Davlatrav*, I. L. R., VI Bom., 495; *Bhola Nath v. Baldeo*, I. L. R., II All., 198; *Lakshmandas v. Dasrat*, I. L. R., VI Bom., 168; *Kanithkar v. Joshi*, I. L. R., V Bom., 442; *Ichharam v. Govindram*, I. L. R., V Bom., 653.)

The Madras High Court at one time seems to have been inclined to take a different view. (*Kallacolatthuran v. Subbaroya*, I. L. R., III Mad., 73; *Kota v. Alibeg*, I. L. R., VI Mad., 174; *Bavaji v. Ram Row*, III Ind. Jur., 554.) But in a later case a more limited operation was given to the section. (*Sitaramudu v. Ramanna*, V Ind. Jur., 463.)

The provisions of the section, however, will apply if one of the rival deeds has been registered under the present Act. (*Ganga Ram v. Bansil*, I. L. R., II All., 431; *Lachman v. Dip Chand*, I. L. R., II All., 851; *Shib Chandra v. Johobuz*, I. L. R., VII Calc., 570; *Gangaram v. Kalipodo*, I. L. R., XI Calc., 661; *Abdul v. Ziban*, I. L. R., V All., 593; *Janki v. Mautangui*, I. L. R., VII All., 577.)

On the question of priority, where a decree has been obtained by the mortgagee under an unregistered mortgage, see *Baijnath v. Lachman Das* (I. L. R., VII All., 888); *Himalaya Bank v. Simla Bank* (I. L. R., VIII All., 23).

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